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In the

Supreme Court of the United States

OCTOBER TERM, 1977

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CITY OF PALESTINE, TEXAS, ANDERSON COUNTY, TEXAS, Et Al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Missouri Pacific Railroad Company, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 19, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 559 F.2d 408, appears in the Appendix hereto at App. 4 The Report and Order of the Interstate Commerce Commission, dated May 4, 1976, are reported at 348 I.C.C. 414.

Pertinent portions of the Commission's Report and Order and excerpts from the Initial Decision of the Administrative Law Judge appear in the Appendix at App. 25.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued and entered on September 19, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where the Interstate Commerce Commission had determined in a merger proceeding under Section 5 of the Interstate Commerce Act that state law restraints are contrary to the public interest because they would frustrate the realization of economies and efficiencies of the merged operation, may the Court of Appeals preclude the removal of those restraints on the ground that the formal merger itself could be effectuated notwithstanding such restraints?

STATUTES INVOLVED

Pertinent portions of Section 5 of the Interstate Commerce Act, as amended (49 U.S.C. §5), are set forth in the Appendix at App. 1*.

STATEMENT OF THE CASE

On November 1, 1974, Missouri Pacific Railroad Company (MoPac) and its principal subsidiaries, the Texas

* Section 403(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 63) redesignated former paragraph (11) of Section 5 as paragraph (12). The Commission's decision and the Fifth Circuit opinion herein refer to this paragraph as (11), and, consequently, that designation is used in this Petition.

and Pacific Railway Company (T & P) and Chicago & Eastern Illinois Railroad Company (C & EI), filed a joint application with the Interstate Commerce Commission to merge the properties and franchises of T & P and C & EI with and into MoPac.

The joint application specifically requested the Commission to include terms and conditions in its order of approval that would nullify certain laws of the State of Texas and an agreement arising thereunder between MoPac and the City of Palestine, Texas, which required MoPac to maintain forever 4.5% of all its employees in certain job classifications in Palestine.* The application stated that complying with the requirements of Texas law and the Palestine Agreement "will be an intolerable burden on the resulting system . . . [and] would be costly and wasteful and unduly interfere with the flexibility which the System needs to meet changes in operating, traffic and economic conditions as they arise, and to effect the benefits contemplated by the proposed merger."

The City of Palestine and Anderson County, Texas, intervened before the Commission and presented evidence in opposition to the request that the Palestine Agreement be nullified. The Initial Decision of the Administrative Law Judge concluded, however, that the condition requested by the joint applicants was fully justified and should be granted.

* The history of the Palestine Agreement and the Texas statutes on which it was based is set forth in detail in the opinion below. (App. 5-9). As the court of appeals noted, the Palestine Agreement has remained in effect as a burden on MoPac solely as a result of Texas statutes requiring railroads operating in Texas to maintain general offices and other facilities at locations where predecessor roads agreed to locate them.

The Administrative Law Judge specifically found that the Palestine Agreement would substantially defeat realization of the economies and efficiencies that would otherwise flow from consolidation and, consequently, that the Agreement's requirements "have no necessary relation to economy and efficiency in operation or service, are contrary to the public interest and the National Transportation policy, and would hinder Applicants' unified operation and service and thereby impose an undue burden upon the proposed unified operation and upon interstate commerce."* (App. 54). The Administrative Law Judge concluded that the Commission had the authority to grant the relief requested as part of its "exclusive and plenary" authority under §5(2)(b) of the Act to approve mergers upon "such terms and conditions and such modifications as it shall find to be just and reasonable" and "consistent with the public interest." (App. 43-48).

On May 4, 1976, the Commission affirmed the Initial Decision and approved the proposed merger with the condition, among others, nullifying the Palestine Agreement:

> "We agree with the discussion, findings, and conclusions of the Administrative Law Judge with respect to the Palestine Agreement and its effect on the proposed merger and on interstate commerce. The Commission has on numerous occasions relieved carriers from the same Texas statutes and similar contractual obligations in proceedings under section 5." (348 I.C.C. at 430; App. 31).

The City of Palestine, Texas, and Anderson County, Texas, petitioned for review of the Commission's order pursuant to 28 U.S.C. § 2321(a). On September 19, 1977, the court of appeals set aside the Order insofar as it prescribed as a condition of the approval of the Missouri Pacific Merger that the roads be relieved of the Palestine Agreement.

Significantly, the court of appeals accepted the Commission's finding that the Agreement was a burden on the consolidated system and interstate commerce:

> "No doubt the merged MoPac system would operate more efficiently and free of 'burdens on interstate commerce' without the strictures of the Palestine Agreement." (App. 14).

The court of appeals nevertheless concluded that §5(11) of the Act limited the Commission's authority in this instance:

> "Section 5(11)'s description of the freedom enjoyed by carriers in an approved merger recognizes that the carrier's immunity from state law extends only '*insofar as may be necessary to enable them to carry into effect* the transaction so approved or provided for. . . .' 49 U.S.C. §5(11) (1970) (emphasis supplied). These words express a practical limitation on the power of the ICC. The ICC's pursuit of the public interest focuses on its approval of railroad mergers, consolidations, acquisitions, and other section 5(2) transactions. Actions taken by the ICC

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* The Palestine Agreement was found to interfere with the effectuation of the economies and efficiencies of the merger in two respects: (1) the Agreement would prevent MoPac from consolidating its Freight Claims Section of the Accounting Department in St. Louis, Missouri, with a resulting savings of $240,238 per year and a more efficient handling of the public's freight claims; and (2) the Agreement would prevent MoPac from building new shop facilities elsewhere in Texas, where the mechanical department employees would be better and more efficiently utilized, to replace the congested, poorly tooled, and obsolete facility at Palestine, which cannot be rebuilt there because of geographical and topological factors. (App. 52-54)

> in connection with those transactions but not necessary to them exceed the scope of its authority. In section 5(11) Congress clearly expresses a sensitivity to state law: the ICC's approval may overturn state law only where 'necessary to carry into effect' the transaction." (App. 12-13).

Expanding on this view of §5(11), the court held that, "even when it serves the general public interest," the ICC has the power to "shoulder aside" state restraints only when such action was "necessary to the effectuation of the merger;" that is, when state laws "stood in the way of the approved transaction." (App. 13, 15).

Thus, the court of appeals concluded that the Commission is powerless under Section 5 to nullify state law restraints even when those restraints frustrate the economies and efficiencies to be realized from a carrier consolidation, impose an undue burden on interestate commerce, and are contrary to the public interest. The court of appeals held that the Commission may attach conditions to its merger approval removing such restraints only when they absolutely prohibit the formal merger as such.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT CONSTRUING THE INTERSTATE COMMERCE COMMISSION'S AUTHORITY TO NULLIFY STATE LAW RESTRAINTS IN APPROVING A CARRIER CONSOLIDATION.

The Court of Appeals for the Fifth Circuit reached its erroneous interpretation that §5(11) of the Interstate Commerce Act (49 U.S.C. §5(11)) imposes a limitation on the authority of the Interstate Commerce Commission to nullify state law restraints by taking a portion of that section out of context. The court of appeals focused exclusively on that part of §5(11) that provides that carrier immunity from state law restraints resulting from a Commission merger approval order extends only:

> "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for. . . ." (App. 13).

This excerpt, which was read out of context to limit Commission state law nullification powers to those instances where the state law stands in the way of the formal merger, is only a portion of §5(11). The entire provision in question reads:

> "they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for *in accordance with the terms and conditions, if any, imposed by the Commission.* . . ." (Emphasis added).

The underscored phrase demonstrates that Congress did not intend §5(11) to be a limitation on Commission authority but merely a description of the scope of the im-

munity conferred by law as a result of a Commission order. State and other laws are nullified insofar as they may interfere with the carrying out of the consolidation in accordance with any terms and conditions imposed by the Commission. The Commission's power to impose such terms and conditions is not governed by §5(11) but only by §5(2)(b), which requires that the terms and conditions be "just and reasonable" and that the merger as approved "will be consistent with the public interest." (App. 2). It was under this grant of authority from §5(2)(b) that the Commission based its action in this case.

The court of appeals' erroneous holding that §5(11) prevents the Interstate Commerce Commission from imposing merger conditions nullifying state law restraints where the restraints would frustrate the economies and efficiencies to be realized by the merger but would not absolutely prevent the formal merger itself is also flatly inconsistent with this Court's decisions in *Texas* v. *United States*, 292 U.S. 522 (1934); *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948); and *Schwabacher* v. *United States*, 334 U.S. 182 (1948). None of these decisions interpreted §5(11) as imposing a limitation on the Commission's authority to prescribe consolidation conditions. Each of these decisions clearly affirmed the Commission's authority to nullify state law restraints that were not absolute impediments to the proposed merger but instead frustrated potential economies and efficiencies.

In *Texas* v. *United States*, this Court upheld the Commission's power to approve terms of a lease that permitted the lessee road to abandon or remove from the State of Texas the general offices, shops, and other facilities of the lessor despite the contrary provisions of the

same Texas statutes underlying the Palestine Agreement. As this Court noted, the removal or abandonment of these facilities would result in an annual savings to the lessee of $81,000. (292 U.S. at 527). To this extent, therefore, the Texas statutes burdened the transaction, but they would not have prevented it. That is, the lease could have been entered into without also moving the offices and shops in violation of the Texas statutes. Nevertheless, this Court held that the Commission had the power to remove such restraints under Section 5 of the Act and its statutory mandate to further the public interest by promoting the development of economic and efficient transportation systems:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. [Citations omitted]. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Citations omitted]. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. [Citation omitted.] *The criterion to be applied by the Commission* in the exercise of its authority to approve such transactions — a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933 — *is that of the controlling public interest.* And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' [Citation omitted.]" (292 U.S. at 530-531; emphasis added).

Because the lease could have been effectuated without the savings that would have resulted from moving the facilities, this Court clearly held that the Commission's nullification power was not limited to state restraints that prohibited proposed transactions but also included those that only imposed financial burdens on those consolidations:

> "The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce. As we said in *Colorado* v. *United States*, 271 U.S. 153, 163: 'Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce.' Even explicit charter provisions must yield to the paramount regulatory power of the Congress. *New York* v. *United States*, 257 U.S. 591, 601. Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.'" (292 U.S. at 531).

As this Court held, the Commission has authority to nullify restraints of state law where such action "has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority." (292 U.S. at 532).*

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* The court of appeals herein acknowledged that the Texas statutes at issue in *Texas* v. *United States* merely "require[d] that the lessor forego consolidation with the offices of the lessee as the price of leasing a Texas-based railroad." (App. 14). But the statutes did not stand (Continued)

In *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948), this Court reaffirmed the Commission's authority to nullify burdensome state law restraints. The Commission had found that Seaboard, a Virginia corporation, would have been subject to "substantial delay and needless expense" in complying with South Carolina statutes that burdened its acquisition of a South Carolina railroad and that such compliance "would not be consistent with the public interest." (333 U.S. at 121).

This Court upheld the Commission's decision nullifying these statutes, even though compliance therewith would not have prevented the acquisition.** This Court noted that, "Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." (333 U.S. at 124-125).

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* (Continued)
in the way of the acquisition by the lessee of the lessor's facilities, the standard articulated by the court below as the *sine qua non* of the Commission's nullification power. The "price" imposed by the burdensome state laws in *Texas* v. *United States* is identical to that imposed by the Palestine Agreement: MoPac must forego the economies and efficiencies of consolidating facilities outside of Palestine with the consequent loss of substantial savings.

** The statement of the court below, in attempting to distinguish this Court's *Daniel* decision, that the South Carolina constitution and statutes "would have negated" the proposed acquisition in that case (App. 14), is incorrect. As this Court noted in *Daniel*, a non-South Carolina corporation could organize a South Carolina subsidiary and then consolidate that corporation with itself, an expensive and burdensome route but not a prohibited one. (333 U.S. at 120).

It is also significant that the *Daniel* decision involved Section 5 as amended by the Transportation Act of 1940, subsequent to the decision in *Texas* v. *United States*. This Court viewed the 1940 amendments as broadening the Commission's powers to deal with burdensome state restraints and held that the only limitation on Commission authority was the requirement in §5(2)(b) that it act in the "public interest":

> "Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation. By §5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940 . . . , Congress granted the Commission 'exclusive and plenary' authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. The breadth of this grant of power can be understood only by reference to §5(2)(b) which authorizes the Commission to condition its approval upon 'such terms and conditions and such modifications as it shall find to be just and reasonable.' All of this power can be exercised in accordance with what the Commission may find to be 'consistent with the public interest.'" (333 U.S. at 125).

This Court concluded that the Commission had the authority to nullify not only "state laws which bar [carriers] from operating in the state," but also those which "impose conditions upon such operation." (333 U.S. at 126).

The breadth of the Commission's authority to nullify burdensome state law restraints was clearly stated by this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). This Court held that the Commission's power to impose conditions in approving a carrier consolidation is subject only to three considerations:

> "First, a finding that it 'will be consistent with the public interest.' (§5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable.' (§5(2)(b).) Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§5(11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction.' (§5(11).)" (334 U.S. at 194-195).

This Court's holding is clearly contrary to the holding of the court below that the Commission is limited by §5(11) and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation.*

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* The facts in *Schwabacher* further belie any such limitation. Minority shareholders who objected to a merger claimed that they had rights under a railroad's charter and state law to a certain level of compensation for their shares. This Court held that the Commission had the obligation to determine the amounts to be received by these dissenters and that such a Commission determination would have the effect of nullifying any contractual or state law restraints even though the Commission had found that the additional amounts requested were of such small magnitude that the road was amply able to bear "any probable expenditure of cash that it might be required to make in connection with the merger.

(Continued)

The decision of the court below, drastically limiting the Commission's authority under Section 5 of the Act, is thus manifestly inconsistent and in conflict with the decisions of this Court. Review by this Court is urgently needed to set aside this clearly erroneous restriction on the Commission's authority.

II. THE DECISION BELOW SIGNIFICANTLY IMPEDES THE DEVELOPMENT OF ECONOMIC AND EFFICIENT RAIL SYSTEMS, CONTRARY TO THE NATIONAL TRANSPORTATION POLICY ESTABLISHED BY CONGRESS.

Review should be granted not only because the decision below is manifestly inconsistent with decisions of this Court but also because the limitation imposed on the power of the Commission is of great importance to the administration of the railroad consolidation provisions of the Interstate Commerce Act. It is the Congressional policy and purpose, reaffirmed as recently as 1976, to encourage railroad consolidations and provide the Commission with all necessary authority to foster the development of efficient and economical rail systems through consolidations and mergers.

The decision of the court of appeals would frustrate Congressional policy by permitting state and local interests to burden severely the development of efficient interstate rail networks by enacting protective laws and

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* (Continued)
Accordingly, it appears that consummation of the merger will not involve a burden of excessive expenditure." (334 U.S. at 189). The contractual and state law claims clearly did not stand in the way of or absolutely prevent the proposed consolidation, as the decision of the court below would require.

ordinances that, while not expressly prohibiting the consolidation of railroads within their jurisdictions, impose costly and uneconomic conditions that are directly contrary to the public interest. If the erroneous construction of Section 5 of the Act by the court below is not corrected, the Commission will be powerless to deal with these parochial restraints and to achieve the goal of economical and efficient rail service mandated by Congress and recognized by this Court in *Texas, Daniel,* and *Schwabacher, supra.*

Beginning with the enactment of the Transportation Act of 1920 (Act of February 28, 1920, c. 91, 41 Stat. 474), Congress has continually manifested its purpose to promote rail mergers and consolidations. The Act empowered the Commission for the first time to approve proposed consolidations found to be in the public interest. Commission-approved mergers were expressly relieved from restraints imposed by restrictive state laws. As this Court recognized, the 1920 Act was designed to assure adequacy of transportation service. *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25 (1932). Congress had determined that the public interest is served by "economy and efficiency in operation." (*Id.,* at 23). This Court most recently emphasized this objective of the 1920 Act in the Burlington Northern merger case, *United States* v. *ICC,* 396 U.S. 491, 508-509 (1970):

> "The 1920 statute as a whole also embodied concern for economy and efficiency in rail operations. . . . The policy of the 1920 Act has been consistently interpreted in this way."

Thus, this Court has held that the Commission's authority to approve mergers and consolidations must "be

given liberal construction in aid of the purposes Congress had in mind." *Escanaba & Lake Superior R.R. Co.* v. *United States,* 303 U.S. 315, 320 (1938). *See also United States* v. *Lowden,* 308 U.S. 225, 230 (1939); *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 81 (1944); *Schwabacher* v. *United States,* 334 U.S. 182, 191 (1948).

The Transportation Act of 1940 (Act of September 18, 1940, c. 722, 54 Stat. 899) reaffirmed and broadened the Commission's authority to approve rail mergers that would lead to a more economic and efficient transportation system. The primacy of this goal was emphasized by the Congressional statement of National Transportation Policy adopted therein:

> "It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of power." (49 U.S.C., preceding §1).

Congress clearly expressed its purpose in the 1940 Act "to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States,* 356 U.S. 412, 416 (1958). *See also* H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61 (1940). Section 5 of the Act was amended to give the Commission "exclusive and plenary" authority to approve proposed mergers and to attach conditions found to be in the public interest. (§5(11), §5(2)(b)). This Court recognized that this enactment was "additional proof of [Congress'] purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation."

Seaboard Air Line R.R. Co. v. *Daniel,* 333 U.S. 118, 125 (1948).*

The Congressional purpose to remove impediments to consolidations and mergers that will promote the economical and efficient transportation system called for in the National Transportation Policy has been most recently evidenced in the passage of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 31). Title IV amended §5(2) and (3) of the Act to provide for expedited merger procedures "to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system." S. Rep. No. 94-499, 94th Cong., 2d Sess. 20 (1975).

Thus, Congress has repeatedly emphasized that the development of efficient, economical rail systems through consolidation and merger is in the national interest. "[T]he congressional directive for a limited number of railroad systems has not been changed. The only change has been in the means of achieving that goal." *Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486, 493 (1968). Congress has consistently expressed its intent that the Commission's "exclusive and plenary" authority to approve merger applications and to impose reasonable terms and conditions that remove burdensome state law restraints be read broadly to achieve this important national goal. *Seaboard Air Line R.R. Co.* v. *Daniel,* 333 U.S. 118, 125 (1948).

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* This strengthening of the Commission's authority in Section 5 some six years after this Court's decision in *Texas* v. *United States,* 292 U.S. 522 (1934), discussed in Section I, *supra,* clearly evidenced Congress' approval of this Court's affirmation of the Commission's power to nullify burdensome state law restraints.

With the advent of the new, expedited merger procedures, consolidation of the nation's railroads will continue at an accelerated pace. Clarification of the Commission's authority to free these newly-formed rail systems from burdensome state and local restraints is of paramount public importance. By denying the Commission power to deal with state and local restraints that burden proposed mergers and consolidations and interfere with the realization of the economies and efficiencies that otherwise would flow from these transactions, the court of appeals has placed the protection of local parochial interests above the Congressional policy of developing a strong, efficient national transportation system through merger and consolidation.

III. THE DECISION BELOW IS CONTRARY TO DECISIONS OF OTHER COURTS OF APPEALS CONSTRUING THE COMMISSION'S AUTHORITY TO NULLIFY RESTRAINTS ARISING FROM STATE AND FEDERAL LAW.

The decision below should be reviewed by this Court for the further reason that its interpretation of the Commission's power under Section 5 of the Act is directly contrary to that of the Court of Appeals for the District of Columbia Circuit in *Altman* v. *Central of Georgia Ry. Co.*, 488 F.2d 1302 (D.C. Cir. 1973), and the Court of Appeals for the Eighth Circuit in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

In *Altman*, preferred shareholders of Central of Georgia Railway Co. brought suit for unpaid dividends for years prior to 1969 that were claimed to be due and owing under the road's charter and by-laws. The Commission had approved an application in January, 1971, resulting in the

merger of the company with the Southern Railway Co. and three of its subsidiaries. The Commission determined that Central of Georgia shareholders were entitled to $84 per share as the just and reasonable value thereof. The court of appeals, relying on *Schwabacher* v. *United States*, 334 U.S. 182 (1948), affirmed the dismissal of these claims, noting that:

> "Appellants' claim of right to additional dividends derives solely from state law, and it does not survive the final order of the Commission approving the consolidation, which order includes the provisions of $84 in respect of each preferred share of Central." (488 F.2d at 1305).

The Court of Appeals for the District of Columbia Circuit did not scrutinize the state law restraint to determine whether it "stood in the way" of the proposed merger, or to determine whether its nullification by the Commission was "necessary" to the completion of the consolidation. In finding no such limitations emanating from §5(11) of the Act, the Court of Appeals for the District of Columbia Circuit's decision is in direct conflict with the decision of the court below.

Also in direct conflict with the decision below is the holding of the Court of Appeals for the Eighth Circuit in *Brotherhood of Locomotive Engineers, supra.* There the court of appeals held that the arbitration provisions of a Commission-approved agreement between the merging roads and a union nullified the dispute resolution procedures of the Railway Labor Act. The court of appeals concluded that §5(11) of the Interstate Commerce Act had the effect of "relieving the carrier from all other restraints of federal law." (314 F.2d at 431-432). The decision of the Court of Appeals for the Eighth Circuit is directly contrary to the limitation construed in §5(11) by the court be-

low.* Resort to the dispute resolution procedures of the Railway Labor Act would not have "stood in the way" of or prevented the merger, as the court below would require. In fact, the formal aspects of the merger had already been accomplished, leaving only the post-merger consolidation of facilities at various common points. The dispute before the court involved the efforts of the surviving corporate entity to realize some of the potential economies of the merger by consolidating yard facilities. The dispute resolution procedures of the Railway Labor Act were not restraints on effectuation of the transaction approved by the Commission but were instead impediments to the realization of its maximum benefits. The decision of the Court of Appeals for the Eighth Circuit is thus diametrically opposed to the decision of the court of appeals in this case.

These conflicting holdings of the courts of appeals provide a compelling need for review of the decision below.**

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* That the Court of Appeals for the Eighth Circuit interpreted §5(11) as merely describing the legal effects of a Commission merger approval, rather than imposing a restriction on the Commission's power to approve conditions nullifying state law restraints, is clear from its quotation from *St. P., M. & O. Ry. Lease,* 295 I.C.C. 696, 702 (1958):

> "The terms of this paragraph [§5(11)] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do."

** The decision below is also contrary to the Commission's own interpretation of its powers under Section 5. *See St. Louis Southwestern Ry Co. of Texas Lease,* 290 I.C.C. 205 (1953), and decisions cited therein at 212-213. This Court has repeatedly held that an administrative agency's construction of its governing statute is entitled to

(Continued)

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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December 19, 1977

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* (Continued)

controlling weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 381 (1969); *Lewis* v. *Martin,* 397 U.S. 552, 559 (1970); *Zeber* v. *Allen,* 396 U.S. 168, 192 (1969); *Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965).

Finally, the Texas courts have acknowledged the Commission's power to nullify burdensome state law restraints such as the Palestine Agreement. *See St. Louis Southwestern Ry. Co. of Texas* v. *City of Tyler,* 422 S.W.2d 780, 784-785 (Tex. Ct. Civ. App. 1967), *applic. for writ of error refused.*

APPENDIX

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APPENDIX

Section 5 of the Interstate Commerce Act, as amended (49 U.S.C. §5):

§ 5. Combinations and consolidations of carriers

• • •

Unifications, mergers, and acquisitions of control; procedures applicable

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed

transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

• • •

Plenary nature of authority under section

(12)* The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation

* Section 403(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 63) redesignated former paragraph (11) of Section 5 as paragraph (12). The Commission's decision and the Fifth Circuit opinion herein refer to this paragraph as (11), and, consequently, that designation is used in this Petition.

participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

CITY OF PALESTINE, TEXAS, et al., Petitioners,

v.

UNITED STATES of America, Interstate Commerce Commission and Missouri Pacific Railroad Company, Respondents.

William M. GIBBONS, Trustee of Chicago, Rock Island and Pacific Railroad Company, Debtor, Petitioner,

v.

The UNITED STATES of America and the Interstate Commerce Commission, Respondents.

Nos. 76-2689 and 76-3507.

United States Court of Appeals, Fifth Circuit.

Sept. 19, 1977.

On Petitions for Review of an Order of the Interstate Commerce Commission. (Texas Cases)

Before COLEMAN, Circuit Judge, KUNZIG, Judge,* and GEE, Circuit Judge.

GEE, Circuit Judge:

We are called upon to review certain collateral aspects of an Interstate Commerce Commission (ICC) order granting authority to merge under section 5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2), to Missouri Pacific Railroad Company (MoPac) and its principal subsidiaries, the Texas and Pacific Railway Co. (T&P) and Chicago & Eastern Illinois Railroad Co. (C&EI). The merger was unopposed, but two controversies surrounding the petition for merger concern us here. The first involves an agreement between MoPac and the City of Palestine, Texas, to maintain a specified number of employees at Palestine. The second involves the intervention by the Trustees of the bankrupt Chicago, Rock Island and Pacific Railroad Company (Rock Island), who requested indemnity for al-

* Judge of the United States Court of Claims, sitting by designation.

leged traffic losses due to the merger or, alternatively, for inclusion in the merger. The ICC relieved MoPac of its agreement with Palestine and denied Rock Island's request for indemnity or inclusion. We reverse the ICC's first action, but affirm the second.

I. *City of Palestine.*

An understanding of the MoPac-Palestine conflict requires a review of the history of the 1954 Palestine agreement. On March 15, 1872, Galusha Grow, President of the Houston & Great Northern Railroad Company (H&GN), entered into an agreement with Judge John H. Reagan to extend H&GN's railroad line to Palestine, to establish a depot within one-half mile of the courthouse, and to commence running cars regularly to Palestine by July 1, 1873. H&GN also agreed to locate and establish and forever thereafter keep and maintain the general offices, machine shops and roundhouses of H&GN in the City of Palestine. In consideration of these promises from H&GN, Judge Reagan agreed to induce the electorate of Anderson County, in which Palestine is located, to issue interest-bearing bonds on the credit of the county in the sum of $150,000 and to deliver those bonds to H&GN. The voters of Anderson County approved the bonds, and H&GN fulfilled its part of the agreement.

International Railroad Company (IRC) also possessed a railroad line to Palestine running from Hearne, Texas. In September of 1873, the stockholders of IRC and H&GN agreed to a merger of the two companies into one corporation. The International & Great Northern Railroad Co. (I&GN). This merger was approved in 1874 by the Texas Legislature as required by state law at that time. The legislative approval expressly provided that all acts done in the name of either of the companies should have the same binding force and effect upon the merged company. In 1875, then, I&GN agreed to establish its offices, machine shops and roundhouses at Palestine. The consideration for this agreement was again the $150,000 in interest-bearing bonds given to H&GN plus an agreement by the citizens

of Palestine to construct, at their own cost and expense, housing for the officers and employees of the company.

Thereafter, I&GN fell upon hard times. In 1911, after a number of financial machinations—none of which are relevant here—, I&GN faced foreclosures of mortgages on all of its corporate buildings. Certain creditors undertook a reorganization of I&GN by the creation of a new corporation that would succeed to all of the rights and liabilities purchased by the creditors at the foreclosure sale. This new company was also called International & Great Northern Railroad. Its corporate charter filed with the Secretary of State of the State of Texas provided that the offices of the new company would be in Houston, Texas.

Anderson County and the City of Palestine responded to the indicated change of corporate headquarters with a suit for an injunction to enforce the 1872 agreement. A spirited legal battle followed involving two Texas courts of civil appeals, *see International & Great Northern Railway Co.* v. *Anderson County,* 174 S.W. 305 (Tex.Civ.App.—Texarkana 1915, writ ref'd); *International & Great Northern Railway Co.* v. *Anderson County,* 150 S.W. 239 (Tex.Civ.App.—Galveston 1912, writ granted); the Texas Supreme Court, *see International & Great Northern Railway Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499 (1913); and the United States Supreme Court, *see International & Great Northern Railway Co.* v. *Anderson County,* 246 U.S. 424, 38 S.Ct. 370, 62 L.Ed. 807 (1918).[1]

[1] The trial court granted a preliminary injunction preventing I&GN from moving its headquarters from Palestine. This was appealed to the Court of Civil Appeals, *see International & G. N. Ry. Co.* v. *Anderson County,* 150 S.W. 239 (Tex.Civ.App.—Galveston 1912, writ granted), and the Texas Supreme Court, *see International & G. N. Ry. Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499 (1913). Although the question in the above cases primarily concerned venue, the courts addressed themselves to the merits by upholding the injunction. After final judgment on a jury verdict in favor of Anderson County and Palestine,

I&GN's primary argument against the injunction action was that it was a new corporation not bound by the contractual obligation of the old company. The Texas cases construing these facts clearly indicate that I&GN was correct if the only obligation to maintain its offices, shops and roundhouses in Palestine derived from the 1872 contract. The contract alone was a personal obligation that would not have bound the new company. *See International & Great Northern Railway Co.* v. *Anderson County,* 150 S.W. 239, 251 (Tex.Civ.App.—Galveston 1912, writ granted); *International & Great Northern Railway Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499, 502 (1913). Nevertheless, each court found the new company impressed with the obligation of maintaining its offices, shops and roundhouses in Palestine because of a Texas statute. That statute provided, in pertinent part, that a railroad company chartered by the state without charter-designated office location

> shall keep and maintain its general offices at such place within this state where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general office for a valuable consideration. . . . And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with an-

[1] (Continued)
the railroad appealed again and lost in the Court of Civil Appeals, *see International & G. N. Ry. Co.* v. *Anderson County,* 174 S.W. 305 (Tex.Civ.App.—Texarkana 1915, writ ref'd), and the United States Supreme Court, *see International & G. N. Ry. Co.* v. *Anderson County,* 246 U.S. 424, 38 S.Ct. 370, 62 L.Ed. 807 (1917).

other as to those which have maintained their original organization.

Tex.Rev.Civ.Stat.Ann. art. 6423 (1911) [now found in Tex. Rev.Civ.Stat.Ann. arts. 6275, 6277 (1926)]. Because the previous company had contractually agreed to maintain its offices, shops and roundhouses at Palestine, the statute had the effect of making this agreement a continuing obligation on the part of the new company. *See International & Great Northern Railway Co.* v. *Anderson County,* 106 Tex. 60, 156 S.W. 499, 503-05 (1913). The United States Supreme Court refused to overturn the state court's interpretation of the effect of the statute and also ruled the statute constitutional. *See International & Great Northern Railway Co.* v. *Anderson County,* 246 U.S. 424, 432-34, 38 S.Ct. 370, 62 L.Ed. 807 (1918). Thus, the 1914 judicial decree of the District Court of Cherokee County forever bound I&GN to maintain its general offices, machine shops and roundhouses in Palestine.

Subsequent to this decree, I&GN was acquired by Missouri Pacific (MoPac). Unfortunately, MoPac suffered bankruptcy shortly thereafter, and on March 31, 1933, MoPac and its subsidiaries filed petitions in bankruptcy requesting approval of a proposed plan of reorganization under section 77 of the Bankruptcy Act. The proposed plan of reorganization filed with the ICC provided for a consolidation of the subsidiaries of MoPac, including I&GN, into a united company. The 1914 decree proved an impediment to this consolidation. Subsection (n) of section 77 of the Bankruptcy Act protected the 1914 judicial decree from the power of the bankruptcy court:

> No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on ac-

> count of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

11 U.S.C. § 205(n) (1970). In light of this proscription, the bankruptcy court held out the possibility that I&GN could be operated as a separate company but preferred that MoPac secure a modification of the 1914 decree so that the planned unification could be complete.

Thus, in 1954, MoPac entered into negotiations with the City of Palestine and Anderson County to secure a modification of the 1914 decree and the 1872 contract. On December 21, 1954, the parties executed the "Palestine Agreement" in which MoPac agree to forever maintain in Palestine 4.5% of all of its employees in certain job classifications. In consideration of this agreement, the City of Palestine and Anderson County agreed to a modification of the 1914 decree to reflect MoPac's new agreement and waived any cause of action against MoPac for noncompliance with the 1914 judgment. On March 2, 1955, the District Court of Cherokee County, Texas, entered a judgment modifying the 1914 decree in accordance with the 1954 Palestine Agreement. The Agreement had the effect of releasing I&GN from its obligations to maintain its general offices, shops and roundhouses in Palestine, and MoPac and I&GN were consolidated.

This case arises from MoPac's attempt to rid itself of the 1954 Palestine Agreement. In connection with its application for ICC approval of a voluntary merger plan designed to unify MoPac with two subsidiaries—Texas & Pacific Railway Co. (T&P) and Chicago & Eastern Illinois Railroad Co. (C&EI)—MoPac asked the ICC to relieve it from the requirements of the 1954 Palestine Agreement. *See* Missouri Pacific Railroad Co.—Merger—The Texas & Pacific Railway Company and Chicago & Eastern Railway Company, 348 I.C.C. 414 (1976). The ICC ruled that it had the power to abrogate the 1954 Palestine Agreement and that, in light of the agreement's unduly burdensome effect on MoPac and on interstate commerce, it would exercise its power to abrogate the agreement. 348 I.C.C. at 430.

The City of Palestine, joined by intervenor Railway Employes' Department, AFL-CIO, appeals that part of the ICC's order abolishing the 1954 Palestine Agreement. Palestine asserts that the ICC lacked power to void a valid contract between a railroad and a third party and that, even assuming the ICC had such power, the Commission exceeded its authority in abrogating this contract. Respondent MoPac and the ICC understandably argue that the Commission could relieve MoPac from the burdens imposed by the Palestine Agreement and properly exercised its discretion in doing so.

To encourage the realization of its national policy of an integrated, efficient and coordinated system of rail transport, Congress empowered the ICC to approve voluntary mergers and consolidations designed to produce efficient and economical railway service in the public interest. In 49 U.S.C. § 5(2), Congress granted the ICC the power to approve voluntary railroad consolidations, mergers, acquisitions and other transactions provided that the proposed transaction is "consistent with the public interest," "just and reasonable" and properly approved by the stockholders of the affected parties.[2] *Schwabacher* v. *United*

[2] (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) For two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; . . .

(b) . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent wtih the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

49 U.S.C. § 5(2) (1970).

States, 334 U.S. 182, 194, 68 S.Ct. 958, 92 L.Ed. 1305 (1948). In section 5(11), Congress granted the ICC exclusive and plenary power to effectuate the transactions approved under the power vested in the Commission in section 5(2). An approved transaction goes into effect without the need for state approval and free of any "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable [the carriers] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ." 49 U.S.C. § 5(11) (1970).[3] Both parties look to an interpretation of section 5(11) to determine the ICC's power to abrogate the Palestine Agreement.

Palestine and MoPac battle mightily over two questions that our disposition of the case renders unnecessary for our decision. The first is the respondents' claim that the 1954 Palestine Agreement is not a true contract but instead derives its power from the Texas statutes requiring railroad companies to continue maintaining their offices, shops and roundhouses in their previously established locations. *See* Tex.Rev.Civ.Stat.Ann. art. 6275-80 (1926). In *Texas* v. *United States,* 292 U.S. 522, 54 S.Ct. 819, 78 L.Ed. 1402 (1934), the Supreme Court ruled that the ICC had the authority to relieve interstate carriers from the effects of the Texas statutes as a concomitant to its power to approve a lease of one railroad by another. Finding that the consolidation of operations in one office outside the state would avoid waste and thus promote the public interest in economy and efficiency of rail transportation, the Court ruled that the ICC's attempt to secure these advantages was well within the congressional purpose of the statute and thus within the ICC's ability. Section 5(11) confirmed that the ICC may pursue the public interest

[3] In 1976, Congress amended certain provisions of the Transportation Act, leading to a redesignation of former § 5(11) as § 5(12). *See* 49 U.S.C.A. § 5(12) (Supp.1977). For convenience, we will continue to refer to the present § 5(12) as § 5(11).

unfettered by state law. Pointing to *Texas* v. *United States,* the respondents argue here that the 1954 agreement was intimately related to Texas law. Without the 1954 agreement, respondents claim, MoPac would have remained bound by the 1914 judicial decree. Had MoPac failed to perform the 1954 Palestine Agreement, the 1914 decree could be reinstated. Respondents urge that these incidents to the 1954 agreement render it indistinguishable from the state statutes that led to its birth and thus subject to the ICC power recognized in *Texas* v. *United States.* Palestine asserts that the contract was a separate agreement supported by valid consideration.

The second claim is respondents' contention that even if the Palestine Agreement is viewed only as a contract the ICC has the power under section 5(11) to abrogate it. Palestine rejoins that Congress did not intend to give the ICC this power.

We need not resolve either of these questions because, assuming for the purpose of argument that the ICC has the power to abrogate this contract, we conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger of T&P and C&EI and does not threaten the merger's success. The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved section 5(2) transaction.

In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger. *See Schwabacher* v. *United States, supra,* 334 U.S. at 207, 68 S.Ct. 958 (Frankfurter, J. dissenting). *Cf. Texas & New Orleans Railroad Co.* v. *Brotherhood of Railroad Trainmen,* 307 F.2d 151, 158-60 (5th Cir. 1962) (ICC exceeded authority when dictated labor contract as part of approval of yard agreement between railroads). Section

5(11)'s description of the freedom enjoyed by carriers in an approved merger recognizes that the carriers' immunity from state law extends only "*insofar as may be necessary to enable them to carry into effect* the transaction so approved or provided for. . . ." 49 U.S.C. § 5(11) (1970) (emphasis supplied). These words express a practical limitation on the power of the ICC. The ICC's pursuit of the public interest focuses on its approval of railroad mergers, consolidations, acquisitions, and other section 5(2) transactions. Actions taken by the ICC in connection with those transactions but not necessary to them exceed the scope of its authority. In section 5(11) Congress clearly expresses a sensitivity to state law: the ICC's approval may overturn state law only where "necessary to carry into effect" the transaction. The ICC has shown little sensitivity in this case.

The Palestine Agreement has no role in the ICC's analysis of the proposed voluntary merger of MoPac, T&P and C&EI. The merger, although increasing the number of "MoPac" employees, will not require an increase in the number of personnel in Palestine: the Agreement provides for a downward adjustment of the percentage of people employed in Palestine in the case of merger. The merger is merely a "corporate simplification" designed to bring two near-wholly owned subsidiaries under the banner of the parent company—the three companies have operated as one system for several years. The Administrative Law Judge and the ICC concluded that the Palestine Agreement was a burden on MoPac and interstate commerce, but there is no indication that this burden presents any obstacle to the merger. Despite the irrelevance of the Palestine Agreement to the merger, the ICC has gratuitously relieved MoPac of its contractual obligations. We cannot countenance this action.

Precedent in the Supreme Court suggests that the ICC may shoulder aside state restraints in its approval of mergers only when such action is necessary to the effectuation of the merger. In *Texas* v. *United States, supra,* the Texas statutes on offices, shops and roundhouses, Tex.Rev.

Civ.Stat.Ann. art. 6275-80 (1926), threatened to prevent one railroad's lease of another by requiring that the lessor forego consolidation with the offices of the lessee as the price of leasing a Texas-based railroad. In *Seaboard Airline Railroad Co.* v. *Daniel,* 333 U.S. 118, 68 S.Ct. 426, 92 L.Ed. 580 (1948), South Carolina constitutional provisions forbidding non-South Carolina chartered railroads from operating in the state would have negated an ICC-approved acquisition of a South Carolina railroad's lines by another railroad. In *Schwabacher* v. *United States, supra,* the insistence on further compensation by preferred stockholders of a merging company exceeded the compensation found just and reasonable in the ICC's approved plan of merger. In each of these cases the voided state-related provision impinged upon the effectuation of the section 5(2) transaction. In describing the ICC's power under section 5(11), the court has characterized it as "the power of the Interstate Commerce Commission, *in the exercise of its statutory obligations,* to override state laws *imposing obstacles* in the path of otherwise lawful plans of reorganization." *Callaway* v. *Benton,* 336 U.S. 132, 140-41, 69 S.Ct. 435, 441, 93 L.Ed. 553 (1949). In all of the cases approving the ICC's nullification of state law, the laws stood in the way of the approved transaction.

Our evaluation of the ICC's power might differ if Congress had granted the Commission direct authority to nullify any contract presenting a burden on interstate commerce, but we find no congressional award of such power to the ICC independent of its power of approval of section 5(2) transactions. From this statutory scheme we deduce that Congress intended to empower the ICC to set aside state law restraints only insofar as necessary to assure the effectuation of approved transactions. Here the Palestine Agreement does not affect the "corporate simplification" merger—in fact, the united system of MoPac, T&P and C&EI has already operated successfully for some time under the Agreement. No doubt the merged MoPac system would operate more efficiently and free of "burdens on interstate commerce" without the strictures of the Palestine Agreement, just as it would operate more efficiently and free of "burdens on interstate commerce" if it were relieved of its contractual obligation to pay its debts or a bargained-for wage scale. Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest—when the destruction is irrelevant to the success of approved transactions.

II. *Chicago, Rock Island and Pacific Railroad Co.* (*Rock Island*).

Rock Island is a not-very-successful competitor of MoPac in the midwest and southwest. The Administrative Law Judge succinctly described the nature of Rock Island's business and its status with regard to the merger applicants:

> Rock Island lines comprise approximately 7,000 miles of railroad in the States of Illinois, Iowa, Kansas, Missouri, Nebraska, Minnesota, Colorado, Arkansas, Tennessee, Oklahoma, Texas, New Mexico and Louisiana. Rock Island maintains through routes and joint rates with the applicants, interchanges traffic with them, and is competitive with them on substantial volumes of traffic moving from, to, and within the territory it serves. Rock Island interchanges with the applicants at numerous points, among them: with the MoPac at St. Louis, Fort Worth, Houston, Kansas City, Little Rock, Memphis, Topeka, and Wichita; with the C&EI at Chicago and St. Louis; and with the T&P at Dallas, Fort Worth and Alexandria.

Just a month before the ALJ's hearing on the MoPac merger on April 15-16, 1975, Rock Island voluntarily filed a petition for reorganization under section 77 of the Bankruptcy Act, 11 U.S.C. § 205, in federal district court in Illinois. Unlike the other intervenors in the MoPac merger,[4]

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[4] Six other railroads intervened in the proceedings: Missouri-Kansas-Texas, Illinois Central Gulf, St. Louis-San Francisco, St. Louis-Southwestern, Santa Fe, and Southern.

the trustee of Rock Island was not satisfied with the protective traffic conditions prescribed in Detroit, T. & I.R. Co. Control, 275 I.C.C. 455 (1950), imposed upon the merging parties by the ICC and sought indemnity for diversion of traffic from Rock Island by the new line.

Rock Island made no substantive presentation at the April hearings in support of its claim for indemnity, but on May 15, 1975, it filed a verified statement and exhibits in support of its estimates of traffic diversion due to the merger. On July 9-10, 1975, the ALJ held a hearing at which Rock Island adduced its evidence and was subjected to cross-examination by the applicants.

Rock Island also sought inclusion in the merger. On May 20, 1975, Rock Island asked the ICC to allow the trustee time to decide whether to seek inclusion in the merger. On September 23, 1975, the district judge overseeing Rock Island's reorganization authorized a petition for inclusion in the MoPac merger that was filed with the ICC on September 25, 1975. The next day the ALJ handed down his initial decision denying Rock Island's request for indemnity or inclusion. Rock Island sought to reopen the hearings to show why inclusion of Rock Island in the merger would be in the public interest. The ICC denied the attempt to reopen the proceedings and affirmed the ALJ's initial decision. Rock Island appealed to the Seventh Circuit, and that circuit transferred Rock Island's appeal to our circuit for consideration with the pending matter of MoPac and the City of Palestine. We affirm the ICC's order.

Rock Island based its request for indemnification on documentary evidence and testimony that the proposed merger would produce wide-scale diversion. Based on studies of 1974 traffic, Rock Island claimed that some 7,047 carloads would be diverted from Rock Island by the MoPac. The initial decision of the ALJ best explains Rock Island's methodology in producing this figure:

> Rock Island conducted a traffic study in order to determine a projected effect the merger of the applicants would have upon its present traffic level. Revenue settlements for 1974 on interline shipments with each of the applicants provided the basis for a computer printout used in the traffic diversion analysis. These settlement reports indicated that the interchanged cars totaled 43,541 with the revenue portion of Rock Island amounting to $15,113,608.
>
> The computer printout contained the following information for each traffic movement: origin State and station; destination State and station; commodity code number and description; originating and terminating junction and connecting railroad; number of trailers; number of cars; shipment weight; miles; and Rock Island revenue. There were 685 pages in the printout with 9,523 line items. Many single car movements were shown; however, when all of the routing factors designated on the report were the same, multiple movements were shown on one line.
>
> Rock Island established the following guidelines for marking traffic movements on the computer printout for diversion to the proposed new merged system: (1) all traffic originating or terminating at Chicago and originating and terminating at MoPac and T&P destinations will be lost 100 percent; (2) all traffic interchanged by Rock Island at Chicago with Eastern carriers and originated and terminated on MoPac or T&P will be lost 100 percent; (3) traffic originating on MoPac or T&P in the southwest and terminating at Rock Island stations, Des Moines and east, including lines north and south of Des Moines, to Iowa-Missouri border, and presently received in interchange at various junctions (Kansas City, Ft. Worth etc.,) will move over the merged system to Chicago, thence Rock Island; (4) traffic originated by Rock Island at points east of the Mississippi River and interchanged with MoPac or T&P at various junctions for termination on MoPac or T&P will move via Chicago; (5) westbound transcontinental traffic currently received from MoPac and

delivered to Southern Pacific at Santa Rosa, New Mexico, will be lost to MoPac-El Paso-Southern Pacific route; (6) eastbound transcontinental traffic to the southeast and southwest destinations now received from Southern Pacific at Santa Rosa (Tucumcari gateway) and delivered to MoPac will be lost to Southern Pacific-El Paso-MoPac; (7) Louisiana and Texas shipments originated by MoPac and T&P and now interchanged to Rock Island at Ft. Worth for delivery to connections at Kansas City will move over the merged system to those Kansas City connections; and (8) similar traffic destined to MoPac common points with Rock Island in Kansas, Missouri and Nebraska (Lincoln and Omaha) will move MoPac direct. In addition to the guidelines, instructions were issued not to record for diversion any traffic movement that physically would be unaffected by the merger.

Rock Island's selection of the first four guidelines was based on the following considerations: (1) the proposed merger will result in longer single-line MoPac routes, which would give the merged system a greater ability to outmuscle Rock Island on competitive traffic; (2) MoPac can afford a larger solicitation budget than Rock Island; (3) MoPac has a larger supply of equipment than Rock Island and the mix is greater; and (4) MoPac has a long-haul routing policy. The last four guidelines were established because Rock Island believes that the new MoPac will emerge with so much clout that Rock Island will be short-hauled on all the traffic identified therein.

Rock Island's traffic expert and an associate reviewed all traffic movements shown on the computer printout to determine if the newly merged system would have the power to divert traffic handled by the Rock Island in 1974. Shipments that could be completely diverted were noted. Alternative routes, including changed interchange points, were posted for short-hauls or partial diversions. As pages of the

computer listing were completed they were given to the Assistant Manager-Pricing (Divisions Section) for entry of divisions percents in connection with short-haul notations as a predicate for calculation of revenue losses for partial diversions.

On the basis of the traffic diversion study, Rock Island concluded that 7,047 interline carloads, which yielded $2,614,997 in gross freight revenues in 1974, would be lost within one year after the merger. Subsequent to cross-examination of its traffic witness and the applicants' rebuttal evidence, Rock island conceded that the estimated revenue loss was overstated by at least $83,394. Therefore, this amount was deducted from the original $2,614,997 estimate loss leaving a potential annual revenue loss of $2,531,603 based upon 1974 rate charges. Rock Island contends that 1974 revenues must be updated to reflect the general rate increases that have occurred since. Making allowance for holddowns and flagouts, Rock Island asserts that its revenue loss which was based on 1974 should be increased by 19 percent in order to bring revenue up to rate levels that will be in effect the last quarter of 1975. Thus, the carrier estimates that it would suffer an annual loss of gross revenue approaching $3 million.

Missouri Pacific Railroad Co.—Merger—The Texas and Pacific Railway Company and Chicago & Eastern Illinois Railroad Company, I.C.C. Finance Docket No. 27773 (Sept. 18, 1975).

The ALJ, with the later support of the ICC, chose not to credit Rock Island's traffic study. He did so because he found the study failed to take into account significant facts needed to determine accurately the likelihood of diversion of the 7,047 cars claimed. He also discounted the considerations underlying the first four guidelines used to establish divertible traffic on the grounds that no significant difference existed between a single-system route and a single-line route; that evidence indicated that the

merger would not increase. MoPac's solicitation budget because the traffic departments of the three lines are already integrated; that MoPac's long-haul routing policy—common in the industry—had no significant impact on Rock Island[5]; and that equipment differences between MoPac and Rock Island were not significant because MoPac had larger system needs and because a comparison of the equipment mix between the parties yielded no important differences. In short, the ALJ found Rock Island's traffic study questionable—certainly not sufficient to support indemnification because of diversion. After examining the record the ICC also concluded that Rock Island's traffic study was not compelling.

After our examination of the record, we believe the ICC had substantial evidence warranting its rejection of Rock Island's traffic study. Although its evidence represented a paper showing of *potential* diversion, Rock Island presented no evidence conclusively indicating that diversion *would* take place. More important, Rock Island made no convincing showing why a diversion would occur under the new MoPac system which had not occurred under the old family of parent MoPac and subsidiaries T&P and C&EI. The financial incentives for diversion were the same,

[5] The long-haul routing policy is a device to increase the revenue of the delivering railroad. When a shipper designates two railroads to haul a shipment, the first must transfer the cargo to the second in the process of delivery. If, however, the shipper has not designated a junction at which the transfer takes place, the first railroad may deliver to the second at any common point within the tariff schedules. Given several common points at which transfer can take place, the first railroad will deliver at the junction that provides it the longest haul.

The MoPac merger has special significance for Rock Island that further ameliorates any diversion. The merger provides Rock Island with a greater number of MoPac common points, giving it an opportunity for longer hauls. Studies by MoPac, cited by the ALJ, indicated that Rock Island's long-haul potential was far greater than MoPac's after the merger.

but Rock Island gave no significant explanation of how a name change and consolidation of an existing unitary system could cause greater harm than separate entities.[6] In fact, the ICC noted that all of the diversions claimed by Rock Island were possible under the present MoPac-T&P-C&EI system and that normal solicitation efforts by the applicants had not produced diversion in the past. After reviewing the record and the ICC's decision, we conclude that substantial evidence supported the ICC's denial of Rock Island's claim for indemnity.

In support of its petition for inclusion,[7] Rock Island

[6] At oral argument counsel for Rock Island suggested that shipping clerks, in designating connecting carriers, tried to minimize typing by selecting a small number of carriers or selecting carriers with few letters. The MoPac merger might give MoPac some benefit by eliminating T&P or C&EI as connections, thus foreclosing Rock Island's substitution because of its fewer letters (RI). Without evidence that this consequence in fact does significantly affect routing, we cannot overturn the ICC's determination.

[7] Rock Island complains that the ICC failed to provide adequate review of its petition for inclusion because the ICC characterized its petition as adding "no new information or contentions to the record, other than those which were adequately discussed and dismissed by the Administrative Law Judge." 348 I.C.C. at 424, when Rock Island had had its petition for inclusion on file only one day before the ALJ's initial decision. Rock Island claims that the ICC relied on the ALJ's actions to reject the petition for inclusion when the ALJ had taken no significant action.

Were this the case we would be concerned, but it is clear that the ICC adequately examined and considered Rock Island's petition for inclusion. The petition was on file with the ICC for over seven months before the ICC issued its report on the MoPac merger. Much of the Rock Island petition for inclusion depended on the diversion evidence adduced in support of its petition for indemnity. The ALJ's rejection of the diversion evidence also reflected adversely on the inclusion claim, and in that sense the ICC could rely on the ALJ's findings.

advanced several factors: its evidence of diversion from its lines by MoPac; the elimination of duplicative routes and facilities; and ICC approval of inclusion of other lines in voluntary mergers. The ICC agreed with the ALJ, as do we, that Rock Island did not present adequate evidence of actual diversion. Thus, diversion evidence did not support Rock Island's claim for inclusion.

Deprived of its major reason for inclusion, Rock Island asserts that the ICC abused its discretion by rejecting Rock Island's evidence that inclusion would streamline facilities, eliminate duplication of routes, and make for efficient rail transport in the public interest and that inclusion was warranted in light of previous inclusions in other voluntary railroad combinations. In reviewing ICC actions for abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), we must grant due deference to the agency's decisions, reversing them only if we conclude that the agency lacked a rational basis for its action. *See Ethyl Corp.* v. *Environmental Protection Agency*, 176 U.S.App.D.C. 373, 541 F.2d 1, 34, *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976). We find no abuse of discretion here.

The ICC concluded that Rock Island had not demonstrated that the inclusion of Rock Island in the MoPac merger was in the public interest. In doing so the ICC implicitly rejected Rock Island's claims that inclusion would promote the public interest in efficient service by concluding that it was in the public interest for the MoPac merger to go through as originally planned.[8] The merger

[8] The ICC's report does not clearly state whether its decision rested on its refusal to credit Rock Island's claims of efficiency or on a decision that, notwithstanding potential efficiency, the public interest was best served by approval of the merger as originally contemplated. Citing recent enactments evidencing congressional purpose to promote railroad revitalization by restructuring the rail system on a "more economically justified basis," see Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, Rock Island urges that the ICC's

itself would not harm Rock Island. Further, the inclusion would so severely burden the merged system that the merger—already determined to be in the public interest—might not go through. The ICC could have chosen to include Rock Island, but we cannot say that its decision not to do so lacks rationality. This is especially true where the proposed merger is a mere corporate simplification with little or no real apparent impact on the party seeking inclusion.

On occasion the ICC has either ordered or held open for five years the possibility of inclusion of other railroads in connection with voluntary mergers. *See*, e. g., *Illinois Central Gulf Railroad Co.—Acquisition—Gulf, Mobile & Ohio Railroad Co., Illinois Central Railroad Co., et al.*, 338 I.C.C. 805 (1971); *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, 327 I.C.C. 475 (1966) (inclusion ordered); *Seaboard Airline Railroad Co. —Merger—Atlantic Coastline*, 320 I.C.C. 122 (1963). From those cases Rock Island argues that it should be included in the MoPac merger. These cases do not suggest an abuse of ICC discretion because they arose in different circumstances. In those cases the ICC considered inclusion because the proposed mergers involved major realignments that could adversely affect other railroads or, in

[8] (Continued)
cavalier dismissal of the efficiency claims supporting inclusion cannot be justified. At the very least, Rock Island asserts, the curtness of the ICC's rejection violates the Administrative Procedure Act, 5 U.S.C. § 557(c), which requires a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. § 557(c)(3)(A).

None of Rock Island's contentions have merit. The ICC's failure to enlarge upon its rejection of Rock Island's efficiency claims stemmed from its well-explained determination that regardless of potential efficiency the public interest was better served by approval of the MoPac merger as originally contemplated.

Pennsylvania, because inclusion posed an insignificant additional burden to a much larger system. Further, each merger involved anticipated savings in the millions that could ameliorate any inclusion that might occur. Here the ICC considers a corporate simplification—not a major realignment; the merger would not significantly affect Rock Island's operation. Inclusion of the financially straitened Rock Island may have been seen as a significant burden on the merged system, and the savings to be effected under the merger as not to justify the burden. The major distinguishing factor is, of course, that in the previous cases the ICC determined inclusion or receptivity to an inclusion petition to be in the public interest, and here it did not. In light of these differences, those cases do not suggest an abuse of the ICC's discretion in denying Rock Island's petition for inclusion.

III. *Summary.*

We have concluded that the ICC exceeded its authority to effectuate approved section 5(2) transactions when it abrogated the Palestine Agreement. We find the ICC's disposition of Rock Island's petitions for indemnity or inclusion supported by substantial evidence and not an abuse of its discretion. Except with regard to the ICC's action on the Palestine Agreement, we AFFIRM.

COLEMAN and KUNZIG, JJ., concur.

FINANCE DOCKET NO. 27773[1]

MISSOURI PACIFIC RAILROAD COMPANY—MERGER—THE TEXAS AND PACIFIC RAILWAY COMPANY AND CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Decided May 4, 1976

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the Administrative Law Judge's initial decision were filed by (1) applicant railroads, Missouri Pacific Railroad Company (MOPAC), The Texas and Pacific Railway Company (T&P), and Chicago & Eastern Illinois Railroad Company (C&EI); (2) the city of Palestine, Tex., and Anderson County, Tex.; and (3) William M. Gibbons, Trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, Debtor (Rock Island). Replies were filed thereto by (1) applicants, and (2) the Railway Employees' Department, AFL-CIO (RED). Additionally, Rock Island, on September 25, 1975 (1 day before the initial decision was served), filed a petition, pursuant to section 5(2)(d) of the Interstate Commerce Act (the act), for inclusion in the subject matter. Applicants filed a reply thereto. Our conclusions differ in part from those of the Administrative Law Judge.

By joint application filed November 1, 1974, MOPAC and its principal subsidiaries, T&P and C&EI, seek authority, under section 5(2) of the act, (a) to merge the properties and franchises of T&P and C&EI with and into MOPAC, and (b) for MOPAC to acquire through ownership of stock, sole or joint control of carriers subsidiary to or affiliated with T&P and C&EI. MOPAC, as the

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[1] This report also embraces Finance Docket No. 27774, Missouri Pacific Railroad Company—Securities.

surviving corporation, seeks authority under section 20(a) of the act, to issue 972,772 shares of its common stock and to assume liability with respect to the securities which T&P or C&EI is liable as obligor or guarantor thereof. There is little dispute as to the facts in this proceeding and inasmuch as they are accurately and adequately detailed by the Administrative Law Judge in his decision, only those facts in dispute or necessary for clarity of discussion will be repeated here.

The Administrative Law Judge found that the proposed merger will be consistent with the public interest because it would permit further simplification of the corporate structure and the accounting and reporting requirements of applicant railroads, it would improve transportation and related service to communities and shippers served by them, and it would produce a more economical and efficient utilization of plant and equipment. Economies through simplification would be made through (a) the elimination of the necessity of maintaining separate corporate existences and making of multitudinous reports to various agencies, both State and Federal; (b) the elimination of the need of maintaining separate books of account and stock records; and (c) the centralization of certain administrative functions now separately maintained. Further, he found that since applicants are presently part of a coordinated system, common ownership will have no materially adverse effect on other railroads. Traffic will continue to move essentially via present routes and gateways, and there should be no material diversion of traffic or loss of revenue to other carriers. Accordingly, he imposed the standard traffic conditions first prescribed in *Detroit, T. & I. R. Co. Control* (*DT&I* case), 275 I.C.C. 455 (1950). Additionally, the Administrative Law Judge, in light of Rock Island's opposition to the proposed merger, imposed a condition retaining Commission jurisdiction over these proceedings for a period of 5 years following the consummation of the transaction for the purpose, among others, of considering (1) a petition under section 5(2)(d) of the act requesting inclusion in the merger, and (2) for good

cause shown, the imposition of such just and reasonable conditions upon petition by Rock Island as may be necessitated by any significant traffic problems arising from the approval of the merger. He required that consummation of the transactions authorized in the initial decision shall constitute irrevocable assent by applicants to the power of the Commission to impose, after hearing, such just and reasonable conditions as may be necessary or appropriate.

Further, the Administrative Law Judge required protective conditions for all employees affected by the proposals in conformity with the so-called attrition conditions for the protection of employees prescribed by the Commission in *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.* (*Western Maryland* case), 328 I.C.C. 684 (1967).

Lastly, the Administrative Law Judge found that the Palestine Agreement[2] between the International-Great Northern Railroad Company and the city of Palestine, Tex., and Anderson County, Tex., and the laws of the State of Texas currently impose undue burdens and obligations on MOPAC and they will impose unduly burdensome, inefficient, injuriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce. Accordingly, he relieved MOPAC from its obligations thereunder through the authority of the Commission under section 5(11) of the act.

* * *

The city of Palestine and county of Anderson except to the finding of the Administrative Law Judge that the Palestine Agreement is an undue burden on interstate commerce. They argue that such agreement is a private contract over which the Commission has no authority and which the Commission cannot void pursuant to section 5(11) of the act. In addition, they request oral argument.

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[2] A history of the Palestine Agreement is contained in the appendix attached herein.

* * *

Applicants also argue that the Palestine Agreement is not in reality a private contract, but is based on an injunction obtained against MOPAC's predecessor under Texas law. But even if it is a "private contract," applicants contend that the Commission has the authority under sections 5(2) and 5(11) of the act to relieve applicants of such agreement pursuant to its approval of a section 5 application. Accordingly, applicants contend that the Administrative Law Judge was correct in his findings and conclusions with respect to the authority of the Commission under section 5(11), and his finding that the Palestine Agreement is an undue burden on interstate commerce.

* * *

The facts involved in these proceedings generally are agreed upon, and the issues in dispute involve disagreements on the conclusions of law which are amply discussed and analyzed in the exceptions and replies. Accordingly, we conclude that nothing would be gained by ordering oral argument in these proceedings, and the requests therefor are denied.

Exceptions and arguments not specifically discussed herein have been considered and found to be without merit or unnecessary to the determination of the issues involved.

Discussion and Conclusions

* * *

The merger application herein does not involve significant changes in the pattern of operation of the MOPAC system, but merely represents a simplification of present MOPAC corporate structure. The proposed merger is nothing more than a consolidation of the corporate identities of the three applicant railroads, MOPAC, T&P, and C&EI. MOPAC has controlled the T&P through stock ownership for over 50 years, *Texas & Pacific Readjustment*. 86 I.C.C. 808 (1924), and has controlled the C&EI through stock ownership for over 10 years, *Missouri Pac.*

R. Co.—Control—Chicago & E.I.R. Co., 327 I.C.C. 279 (1965). MOPAC and T&P have been operating as a unified entity with assimilated power and equipment, and common departments and personnel for about 10 years. The C&EI has been operated on a assimilated basis with the other two railroads in the same manner for about 6 years. The operation of these three railroads on an integrated basis means that, unlike a proceeding where one railroad seeks to merge with another unaffiliated railroad, the coordination and combination of departments and personnel of merging railroads will not result in the customary significant economies involved in the elimination of duplicate departments.

The economies projected here are from the elimination of separate departments and records which must be maintained for the three corporate entities. These savings are explained in detail in the initial decision. Essentially, savings would result from the elimination of separate financial and administrative records and the reduction in the number of reports required by various Federal and State agencies. The principal department which would be affected here is the accounting department which, except for freight claim accounting, is located in St. Louis. This department maintains the accounting records for the entire MOPAC system, and separate books are also kept for each of the three corporations. Each corporation additionally maintains its own set of books and accounts independent of the central books. Applicants estimate that the consolidation of these separate accounts would eliminate 427 reports to Federal, State, and local governments, 1,450 internal management reports, and some 133,180 yearly accounting documents. The elimination of these and other duplicate functions are projected to save 35,396 man-hours of labor. The entire monetary savings for the accounting department would be approximately $440,000 per year.

Furthermore, the corporate consolidation would permit the simplified handling of waybills through MOPAC's central computerized waybill production system, the im-

proved utilization of the car fleet of the three railroads, and the solicitation of traffic for a single MOPAC routing rather than the present three-carrier routing.

While the administrative economies from corporate simplification are significant, the evidence of record indicates that the operational advantages from this merger will be minimal. No substantial economies should be realized from the elimination of duplicate lines or facilities because these three railroads are virtually end to end. According to applicants, since they are already operating a coordinated system under the common control of MOPAC, the new direct ownership can have no adverse effect on other railroads. Traffic will continue to move as it presently does, and joint rates and through routes involving one or more of the three companies will be maintained after the merger. The divisions of revenue on joint-line traffic accruing to each of the three corporations, when one or more of them are in a joint-through route, will be cumulative for the merged corporation. The divisions of revenue for other railroads participating in joint rates should remain the same. In view of these conclusions, it is difficult to perceive any significant advantage obtainable by a consolidated MOPAC through corporate simplification which would enable it to divert significant amounts of traffic from competing railroads.

One possible alteration brought out at the hearing is a minor change in routing that could be made by MOPAC where junctions between connecting carriers are not specified by shippers. Lack of designated junction points would in some cases permit MOPAC a longer haul on some traffic because T&P and C&EI junctions with the connecting railroad would now all be MOPAC connections. Because of this, there will be more interchange points between the consolidated MOPAC and connecting railroads and more junctions via which through routes apply. On MOPAC deliveries to connecting carriers, MOPAC would have the opportunity on certain traffic to make delivery at a more distant junction increasing its revenue and decreasing the revenue of the connecting carrier. However,

on shipments delivered to MOPAC, there would be a similar opportunity for a longer haul by the connecting carrier on this same type of traffic.

Applicants assert that the revenues gained or lost from such opportunities would tend to offset each other. Furthermore, the connecting railroads and MOPAC could protect their present routings by inducing the shipper to specify junctions in the routing on the bills of lading.

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Palestine Agreement.—The Administrative Law Judge found that the laws of the State of Texas and the Palestine Agreement currently impose undue burdens and obligations on MOPAC, and that they will impose unduly burdensome, inefficient, juriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce. The Administrative Law Judge further found that such restraints are contrary to the public interest and the national transportation policy, that the Commission has the authority under section 5(11) of the act to relieve MOPAC of these requirements, and that MOPAC should be relieved of its obligations thereunder.

We agree with the discussion, findings, and conclusions of the Administrative Law Judge with respect to the Palestine Agreement and its effect on the proposed merger and on interstate commerce. The Commission has on numerous occasions relieved carriers from the same Texas statutes and similar contractual obligations in proceedings under section 5. *St. Louis S. W. Ry. Co. of Texas Lease,* 290 I.C.C. 205 (1953); *Kansas City Southern Ry. Co. Merger,* 254 I.C.C. 529 (1943). The Commission's power to grant such relief consistently has been upheld. See *Texas* v. *United States,* 292 U.S. 522 (1934); *Seaboard R. Co.* v. *Daniel,* 333 U.S. 118 (1948); *Schwabacher* v. *United States,* 334 U.S. 182 (1948). Accordingly, we conclude that the arguments of the city of Palestine and county of Anderson, Tex. are without merit.

Statutory findings.—In Finance Docket No. 27773, subject to the terms, conditions, and modifications hereinbefore discussed, which we find to be just and reasonable, we find that (1) the merger of the properties and franchises of The Texas and Pacific Railroad Company and the Chicago & Eastern Illinois Railroad Company into the Missouri Pacific Railroad Company for ownership, management, and operation; (2) the acquisition by the Missouri Pacific Railroad Company through ownership of stock, of sole or joint control of companies subsidiary to or affiliated with The Texas and Pacific Railway Company and the Chicago and Eastern Illinois Railroad Company; and (3) the acquisition of indirect control by the Mississippi River Corporation; a noncarrier owner of a controlling stock interest in the Missouri Pacific Railroad Company, are just and reasonable and constitute transactions within the scope of section 5(2)(a) of the Interstate Commerce Act, and will be consistent with the public interest.

In Finance Docket No. 27774, we find that the issuance by the Missouri Pacific Railroad Company of 972,772 shares of its common stock and the assumption by the Missouri Pacific Railroad Company in respect of securities to the extent to which either The Texas and Pacific Railway Company or the Chicago and Eastern Illinois Railroad Company is liable as obligor or guarantor thereon under the terms and conditions set forth (a) are for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by the Missouri Pacific Railroad Company of service to the public as a common carrier and will not impair its ability to perform such service, and (b) are reasonably necessary and appropriate for such purposes.

And we further find that the petition of the Chicago, Rock Island and Pacific Railroad Company for inclusion in the merger approved and authorized in Finance Docket No. 27773 should be denied.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER O'NEAL, dissenting in part:

The Palestine Agreement is a contract originally entered into in 1872 between the town and the railroad. The subsequent statutory support of that contract created by the Office Shops Act and the removal of that support by the Transportation Act of 1920 does not alter the existence and terms of the original contract. The 1954 Agreement between the city of Palestine and Anderson County, on the one hand, and the railroad, on the other, modified the earlier contract and is based on it.

The intervenors question whether this Commission has the authority under sections 5(2) and 5(11) of the Interstate Commerce Act to relieve the railroad of its contractual obligations. The Administrative Law Judge answered that question in the affirmative.

Assuming that the Commission does have authority to set aside contracts in section 5 proceedings, that authority should be used with discretion. It should be used only to abrogate agreements which, if allowed to stand, would block a section 5 transaction which would yield a significant public benefit. The Commission was granted "plenary power" in section 5 to assure that transactions which served the broad public interest would not be frustrated by local interest laws. That authority was not intended to be a means by which railroads could relieve themselves of bothersome contractual obligations through merger.

The Palestine Agreement is not an impediment to this merger. The railroad and the town entered into this contract on their own volition. Valuable consideration in the amount of $150,000 (in 1872 dollars) passed to the railroad. No term of the private agreement gives the railroad

any right to unilaterally withdraw from its obligations. And there is no overriding public policy reason for abrogating the contract, even if we make the doubtful assumption that the Commission could do so in this case. The railroad has lived with this contract for some time and could continue to do so. The carrier's arguments as to the burden of keeping the freight claims department in Palestine are irrelevant; the contract does not require that that function be kept there. The car repair shop employs the majority of the workers. The railroad admits that a car repair facility is needed in the area and states that if it is relieved of the Agreement, it will build one between Palestine and Houston. However, it has not shown why it cannot build a new facility near Palestine, if it feels the existing one to be inadequate.

This holding, if allowed to stand on the basis of these facts, sets a precedent by which the Commission allows carriers to escape their contract obligations merely on a showing that it would be to the carrier's advantage to do so. The contract in question was freely entered into, and its abrogation will greatly harm, if not devastate, the economy of Palestine, Tex. Abrogation in this case serves no public purpose, only the private purposes of the railroad. Our statutory authority in this area has its limits, and in this proceeding the Commission has exceeded those limits. Even if we were to have the authority, however, it should not be used in these circumstances.

APPENDIX

Excerpted below are certain pertinent sections of the Initial Decision of the Administrative Law Judge:

Historical Background and Nature of the Restraints From Which Applicants Seek Relief

In 1872, the Houston Great Northern Railroad Company, predecessor of the International-Great Northern, contracted with the citizens of Palestine, Texas, in Anderson County, in consideration of $150,000.00 of bonds issued by the county and delivered to the railroad company, to

maintain its general offices, machine shop and roundhouses at Palestine, Texas. In 1873, the Houston and Great Northern Railroad Company was consolidated with the International Railroad Company.

In 1875, the consolidated company, known as the International and Great Northern Railroad Company, in consideration of the erection of houses for its employees in Palestine, Texas, renewed the above contract with the City of Palestine. All of these agreements were oral, but their existence was established in subsequent litigation.

The offices and machine shops were then established at Palestine, Texas, and, with some interruptions, not material here, they were subsequently maintained there. Certain mortgages executed by the original companies were foreclosed in 1879 and the railroad property was then sold and conveyed to a new Texas corporation, still called the International and Great Northern Railroad Company, by a deed conveying all the franchises and chartered powers of the original companies. In 1881, the purchasing company executed a mortgage on its property, which was foreclosed in 1910.

Meanwhile, however, certain statutes had been enacted by the Legislature of Texas. The first, known as the "Office-Shops Act", approved March 27, 1889, Acts 1889, p. 130, G.L. Vol. 9, p. 1158, provided that every railroad company chartered by, or owning or operating any line of railroad within the state shall permanently maintain its general offices at the place in Texas named in its charter, and if no certain place was named therein, at such place where it shall have contracted or agreed to locate them; also, that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that the offices, shops, or roundhouses were located on the line of railroad in a county that had aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed.

In addition, this Act required that all the general offices of the company reside and maintain their offices at the

place in Texas designated as the general offices of the railroad. It was also enacted that a violation of this Act by any railroad company of the State should cause a forfeiture of its charter and a penalty of $5,000.00 a day was prescribed for every day of violation.

As previously stated, the I&GN Railroad Company mortgage of 1881 was foreclosed in 1910 and the foreclosure decree, dated May 10, 1910, ordered a sale, which was made June 13, 1911. The purchaser was the International and Great Northern Railway Company. Based on the assumption that the above discussed Office-Shop and other laws, passed since the mortgage was made, did not affect the property after foreclosure, the purchaser filed in court a repudiation of any agreement of its predecessors to maintain offices and shops at Palestine, Texas, and so notified the officials of Anderson County in the City of Palestine, Texas. The Articles of Incorporation of the purchaser fixed the place for the general offices at Houston, Texas.

Anderson County, the City of Palestine, and certain citizens then brought suit in the Texas District Court against the successor, I&GN Railway Company, asking for a decree "enforcing the public duty of defendant to forever keep and maintain its general offices, machine shops, and roundhouses in the City of Palestine," and for an injunction against its maintaining any other general offices in connection with the operation of the railroad at any other location in violation of the laws of the State. In 1914, the District Court entered its decree in favor of the plaintiffs, which enjoined I&GN • • •

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The Defendant railroad then appealed to the Court of Civil Appeals of Texas, which affirmed the Judgment, *International & G.N. Ry. Co.* v. *Anderson County*, 174 S.W. 305 (Tex. Civ. App. Texarkana 1915) writ ref. The case was appealed to the Supreme Court of the United States which, in 1918, affirmed the Judgment against the railroads. *International & G.N. R. Co.* v. *Anderson County*, 246 U.S. 424, 62 L. Ed. 807 (1918). In its opinion the

Supreme Court does not specifically state whether a contract or statute was being enforced. However, it would appear from the language used that the existence of the statute prevented foreclosure from eliminating the obligation. Speaking for the court, Mr. Justice Holmes states: "But the foreclosure did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary course. Suppose that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond the foreclosure that the general offices were to remain forever at Palestine—it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if the law made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise, or whether the remote reason for it was a contract or a general motion of public policy. State courts hold that when the law on any ground fixes a place on the offices and shops, the obligation is indelible by foreclosure. We see no reason why their decision should not prevail." *International & G.N. R. Co., supra,* 431-432.

Any doubt that might be raised regarding this issue is about erased when viewing this language in the perspective of the Texas Appellate Court's opinion which was being reviewed. *International & G.N. Ry. Co.* v. *Anderson County, supra,* 316, the Texas Court of Civil Appeals emphasized that:

"The defense of appellant and the right of appellees were entirely dependent upon whether a statutory provision of the state in respect to charter rights of appellant in location of its domicile was applicatory. The decree was entirely dependent upon the statute, and not the enforcement of a private contract as such, for its validity. The contract was only evidence in the line of facts going to prove the application of the statute, and did not operate or have the legal effect to create a lien in rem, or any other legal liability or claim in favor of the appellees."

Thus, there is little doubt but that both the Texas Appellate Court and the United States Supreme Court in 1915, and 1918, respectively, considered that the state statute only prevented the removal of the railroad general offices from Palestine, Texas.

About 10 years later the New Orleans, Texas & Mexico Railway Company acquired control of I-GN and MoPac acquired control of New Orleans, Texas & Mexico Railway Company. *Control of International-Great Northern R.R. By New Orleans, Texas & Mexico Ry.*, 90 I.C.C. 262; *Control of Gulf Coast Lines by Missouri Pacific R.R.*, 94 I.C.C. 191. Representatives of the City of Palestine and County appeared in both proceedings to request conditions requiring compliance by MoPac with the 1914 Judgment and the Office-Shops Contract (i.e., requiring that the general offices, machine shops and roundhouses of I-GN be maintained in Palestine), but this Commission found such conditions unnecessary saying:

"The President of the Applicant testified that if the application be authorized his company would assume every contract or obligation binding upon the International Company. It is not shown and does not appear how a change of the controlling stock interest could relieve the International Company from any legal obligation." 90 I.C.C. 262, 266.

In *Control of Gulf Coast Lines, supra,* the Commission observed that "it is stated that the validity of this contract has been sustained by the United States Supreme Court. We are of the opinion that questions which relate to the enforcement of judgments of the Courts should properly [illegible] to those tribunals." 94 I.C.C. 191, 198.

[illegible]929, the Commission was requested to approve a [illegible]ding under Section 5(2) of the Interstate Com[illegible]e Act authorizing MoPac to lease and operate the properties of the I&GN and other controlled lines. *Missouri Pac. R. Co. Unification,* 166 ICC 154 (1930). At that time relief from the obligation to maintain general offices, machine shops and roundhouses at Palestine, Texas was

requested, but the Commission felt that it had no jurisdiction to grant the requested relief. The Commission apparently took the position that state laws and state created obligations imposed on interstate carriers could only be set aside if the laws and obligations conflicted with Federal laws.

Thus, the Commission in 1930 felt itself without jurisdiction to relieve the MoPac of the conditions that now form the Palestine Agreement. See also *Missouri Pac. R. Co., Unification,* 175 ICC 26 (1931). Applicants contend that the Commission does have such jurisdiction and power by virtue of the National Transportation Act of 1920 and the subsequent 1940 Amendments conferring "exclusive and plenary" power on the Commission in Section 5 transactions.

After 1931, the situation remained unchanged until the years of bankruptcy, commencing in 1933, and the I&GN complied with the statutory obligation to maintain its general offices, machine shops and roundhouses in Palestine, Texas. A plan of reorganization was proposed, and a decision was reached to incorporate the I&GN separately, and thus avoid the possibility that the general offices of the reorganized system be located at Palestine, Texas. A recent amendment to the Bankruptcy Act, Section 77(n), appeared to make that result a real possibility. However, the need for such a separate incorporation of the I&GN under the plan of reorganization became unnecessary because an agreement was reached with the City of Palestine and Anderson County resulting in a modification of the original 1914 court decree. By this modification decree, dated March 2, 1955, the consolidated company was obligated to maintain a certain number of employees, and percentage of annual payroll in Palestine. Thus, this agreement attempted to eliminate the general office and shop maintenance requirement and the requirement that certain officials be located in Palestine, Texas. Basically the agreement calls for a specified percentage of total system shop and office employees to be located in Palestine, Texas. • • •

By order entered December 29, 1954, the United States District Court, in St. Louis, granted authority to the Bankruptcy Trustee to execute the Agreement, and went on to order:

"• • • That upon such proposed new Judgment being entered in the District Court of Cherokee County, Texas, if it is so entered, superseding the 1914 Judgment of that court, Guy A. Thompson, as Trustee, International-Great Northern Railway Company, Debtor, the reorganization managers of the Debtor, International-Great Northern Railway Company, and the debtor company, are all successors in interest, be and they are bound thereby, in that they be and hereby are authorized and directed jointly and severally to carry out the terms and conditions of the aforesaid contract and the decree or judgment entered in conformance therewith."

The 1954 Agreement or what is now known as The "Palestine Agreement," was executed on behalf of the city, by its Mayor pursuant to an Ordinance of the City Council, and on behalf of Anderson County by its County Judge, pursuant to an Order of the Commissioners' Court; and on behalf of the Railroad, by its Trustee, pursuant, as noted above, to an order of the United States District Court in the reorganization proceedings dated December 29, 1954 specifically authorizing and approving such new Agreement.

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Pursuant thereto, a hearing was held before the State District Court in February 1955 to so modify the 1914 Judgment, and certain citizens of Palestine and Anderson County intervened in opposition to approval of the new Agreement on the ground that Palestine and the County were unnecessarily surrendering valuable rights under the old Office-Shops Contract and the 1914 Judgment, asserting that the Railroad was not in good faith complying with that Contract and Judgment, and that such Contract and Judgment should be enforced against it.

At that hearing MoPac's then Chief Executive testified that the Railroad and its Trustee were seeking a way to

modernize the old I-GN Contract in such terms that "forever and thereafter we could always live in peace and harmony with Palestine"; that the Railroad and its Trustee concluded that the best yard stick to work with in the future would be to use a stated percentage of the type of employees covered by the 1914 Judgment so that regardless of future combinations or consolidations the number of employees to be at Palestine could be determined. MoPac's Chief Executive testified that he considered the Railroad has a "moral duty to see that Palestine did not suffer if there was any practical way to do it without costing the Railroad a charge of inefficiency"; that he felt obligated to give Palestine "the economic equivalent of what they had or considered they had" under the I-GN Contract; that as far as the Railroad was concerned, he considered the 1954 Agreement a permanent settlement of the controversy between the Railroad and the City and County; that it was inconceivable to him that the Interstate Commerce Commission would re-open the question of burden on interstate commerce when both contracting parties had agreed that it was not; and that after the system is consolidated "we feel that we can always find sufficient work to do in Palestine and personnel to keep there, we don't think that there will be any trouble about maintaining that percentage. We are willing to take that on that obligation."

Since the 1955 decree was entered, the agreement has remained unchanged until the present time. The statutory requirements enacted in 1889 have also been carried forward to the present day by subsequent revised statutes as set forth previously.

At the present time, MoPac has its freight claims department, a diesel service facility and a freight car repair shop located in Palestine. There are approximately 64 employees in the freight claims department, 222 in the car repair shop, and 86 other employees (such as yardmasters, switch tenders, hostlers and others, coming within ICC Employee Classifications I, II, IV, V and VI(a) (which are the ones included within the 1954 Agreement)

located at Palestine. There are 294 other employees (such as engineers, trainmen, section and maintenance of way employees) presently employed at Palestine whose jobs fall within other ICC Employee Classifications which are not covered by the 1954 Agreement.

The freight claims department was moved voluntarily by MoPac to Palestine in 1955. In 1959 or 1960 the T&P freight claims department was also moved to Palestine and this department handles freight claims for both MoPac and T&P. If MoPac is relieved of the obligations of the 1954 Agreement, then it wants to move this department and its 64 employees to St. Louis. Yet there is nothing in the 1954 Agreement which prevents such removal. Of these 64 freight claims department employees, 13 positions now at Palestine and two in St. Louis could be eliminated and these employees would be assigned other work. Employees with less seniority would lose their jobs.

MoPac apparently has no immediate plan to eliminate the car repair shops at Palestine and offered no testimony to show any monetary savings to be effected thereby. The shop is "outmoded" and has become "poorly tooled and obsolete" in that "other shops • • • are far more efficient." MoPac concedes that there is a need for such a shop facility in Texas and that it would like to construct such a new shop which would be modern in track layout, buildings and tooling. Apparently MoPac has been trying to secure options on land South of Palestine and North of Houston for that purpose. Of the 615 Missouri Pacific and 543 T&P Mechanical Department employees located within Texas, 209 (18%) are now located in Palestine; that "relocation to a new shop would still leave some 40 mechanical people (3.5%) in Palestine" and that "the remaining 80% of the force (the other 169 now at Palestine) would have the opportunity to follow the work to the new shop location". The record also indicates that "there will always be some repair work (done at Palestine) because of the geography of • • • the railroad." A witness testified that the shop facilities at Palestine

are worth "a number of millions of dollars" and that there is no physical impediment to locating this shop elsewhere in Palestine or in the general area of Palestine.

The City of Palestine is located in the Eastern part of Texas on the Missouri Pacific's main line between St. Louis, Missouri and Laredo, Texas, and is the juncture point for its main line to Houston. According to the Federal Census, its 1950 population was 12,503, and its 1970 population was 14,525. According to the 1974 *Texas Almanac,* Palestine's estimated population as of April 1, 1973 was 15,600, with employment of 4,767, annual wages of $26,212,816, and total annual income of $69,305,000.

Exhibit 11 shows that for the month of February, 1975, the Missouri Pacific was required by the 1954 Agreement to employ 353 employees at Palestine, but actually employed 372 Agreement-related employees there, whose monthly compensation average $907.84 each. It had Agreement-required employee compensation for that month of $348,467.48 and actual employee compensation of $337,-716.74. Thus, assuming the same total employment and wages in February, 1975, as at April 1, 1973, the Missouri Pacific's employees under the 1954 Agreement represent approximately 8% of the total number of employed persons in Palestine, and the wages it paid them, approximately 15.5% of the total wages paid in Palestine. If all 64 of the Missouri Pacific's freight claims department's employees, and all but 40 of the mechanical department's employees, should be moved out, the annual loss in wages paid in Palestine (based on Exhibit 11) would be approximately $3,617,000. This is the impact on the economy which the City of Palestine is concerned.

It long has been established that this Commission has the authority to relieve the Applicants of all restraints, limitations, and prohibitions of law insofar as may be necessary to enable them to put into effect the proposed merger consistent with the public interest and the national transportation policy. *Seaboard Airline R. Co.* v. *Daniel,* 333 U.S. 118, 92 L. Ed. 581 (1948); *Texas* v. *United States,*

292 U.S. 522, 78 L. Ed. 1402 (1934); *Schwabacher* v. *United States*, 334 U.S. 182, 92 L. Ed. 1305 (1948).

The legislative history of the Transportation Act of 1920, is described by the Supreme Court in *Schwabacher* v. *United States*, *supra*, as

"The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920. In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system." (334 U.S. 191-192).

Among the powers and duties granted to this Commission is the "exclusive and plenary" authority to approve mergers between carriers, upon such terms and conditions as the Commission "shall find to be just and reasonable" and "consistent with the public interest." When such a merger is approved, the carriers involved "are relieved" from the operation of all "restraints, limitations and prohibitions of law insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission." 49 U.S.C.A. §§5(2), 5(11). The Commission has on numerous occasions relieved carriers from the same statutes which Applicants seek relief from and similar contractual obligations in Section 5 transactions. *St. Louis S.W. Ry. Co. of Texas Lease*, 290 ICC 205 (1953); *Kansas City Southern Ry. Co. Merger*, 254 ICC 529 (1943).

This action has been consistently upheld by the courts. In the leading case of *Texas* v. *United States, supra*, the United States Supreme Court unanimously held that, in approving a lease between railroads under 49 U.S.C.A., the Commission had the power to relieve the Applicants from the restraints of the same statutes which Applicants seek relief from. The statute which was held to have been superseded by ICC order in *Texas* v. *United States, supra* was Article 6275, Texas Revised Civil Statutes, 1925, which, in its prior codification provided the basis for the injunction entered against the I&GN in 1914 and the statute which also provided the basis for the subsequent 1955 Agreement with the City of Palestine, Texas.

Noting the requirement of the Transportation Act that railroad leases be approved upon conditions which will promote the public interest, the Supreme Court observed that the Commission had found the requirement to maintain general offices at a specific location in Texas as inconsistent with the purpose of the Transportation Act of 1920.

"* * * We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. *Railroad Commission of Wisconsin* v. *Chicago, B.&Q.R. Co.*, 257 U.S. 563, 585; *New England Divisions Case*, 261 U.S. 184, 189, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, 478. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v. *Farmers Co-operative Co.*, 262 U.S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C.&S.F. Ry. Co.*, 270 U.S. 2666, 277. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion

reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933, is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities'. *New York Central Securities Corp.* v. *United States, supra.*

It is in the light of this criterion that we must consider the scope of the Commission's authority in relation to provisions which are intended to relieve interstate carriers from burdensome outlays. The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interest commerce. As we said in *Colorado* v. *United States,* 271 U.S. 153, 163: 'Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce.' Even explicit charter provisions must yield to the paramount regulatory power of the Congress. *New York* v. *United States,* 257 U.S. 591, 601. Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.' *Colorado* v. *United States, supra,* p. 165. See *Transit Commission* v. *United States,* 284 U.S. 360, 367, 368; *Transit Commission* v. *United States,* 289 U.S. 121, 127; *Florida* v. *United States,* ante, p. 1. In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the State, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority." (292 U.S. 530-532).

Texas v. *United States,* of course, was decided before the Transportation Act was amended, in 1940, to include the provision granting the I.C.C. "exclusive and plenary" authority in approving leases and other acquisitions. Thus, the Commission's power in this respect is even broader, than it was at the time *Texas* v. *United States* was decided.

This point was made in 1948 in *Seaboard Air Line Railroad Co.* v. *Daniel, supra.* There, this Commission, pursuant to a reorganization under 49 U.S.C.A. §5, approved the application of a Virginia railroad to operate in South Carolina. The constitution and statutes of South Carolina provided that railroad lines within that state could be owned and operated only by South Carolina corporations, so the I.C.C. affirmatively authorized a Virginia railroad to operate the railway system "without complying with the South Carolina railroad corporation laws." It was urged that the Transportation Act should not be construed to authorize the I.C.C. so to override state enactments. The Supreme Court upheld the I.C.C., however, and said:

"Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind. In keeping with this purpose Congress has often recognized that the nation's railroads should have sound corporate and financial structures and has taken appropriate steps to this end. The purchase of this very railroad by appellant resulted from extensive reorganization proceedings conducted by the Interstate Commerce Commission and federal district courts in accordance with congressional enactments applicable to railroads. In furtherance of this congressional policy these agencies approved reorganizational plans which called for the purchase and operation of these properties, including the portion in South Carolina, by appellant, as a Virginia corporation.

This Court has previously approved a Commission order entered in a §5 consolidation proceeding which granted

a railroad relief from state laws analogous to the state requirements here. *Texas* v. *United States,* 292 U.S. 522 (1934). Most of the reasons which justified the Commission's order in that case are equally applicable here. Furthermore, since that case was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation. By §5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49. U.S.C. §5(11), Congress granted the Commission 'exclusive and plenary' authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. The breadth of this grant of power can be understood only by reference to §5(2)(b) which authorizes the Commission to condition its approval upon 'such terms and conditions and such modifications as shall find to be just and reasonable.'" (333 U.S. 124-126)

Clearly, then, this Commission has the power to grant applicants' relief as part of the Commission's "exclusive and plenary" authority to approve mergers upon "such terms and conditions and such modifications as it shall find to be just and reasonable" and "consistent with the public interest."

The City of Palestine and the County of Anderson argue that the 1955 Agreement is a purely contractual obligation between the parties despite the fact that the court decree upon which the Agreement is predicated is based upon the state statutes requiring the maintenance of certain offices and personnel in Texas. However, assuming for the sake of argument that the "Palestine Agreement" is a purely contractual obligation, the Commission nevertheless has the power under 49 U.S.C.A. §5(2), 5(11), to relieve Applicants of the contractual obligations resulting from the "Palestine Agreement" by virtue of state law when the Commission finds it in the public interest to do so. In fact, the Commission has previously relieved other carriers from similar contractual obligations. In *St. Louis S.W. Ry. Co. of Texas Lease, supra,* the Commission re-

lieved the Applicant of its contractual obligation with the City of Tyler, Texas, to perpetually maintain in Tyler its machine shops and general offices. In holding that the Applicant was relieved from the operation of state law and the burdensome "Tyler Agreement," the Commission stated: "The record is clear that it would be imprudent for the applicant to lease the properties of the Texas company if the effect would be to subject the entire system operations to the requirements of Texas laws and thus prevent it from carrying on its business and locating its offices in a manner most consistent with operating economy efficiency. Compliance with the State and Municipal laws and contracts as shown herein would hinder economy and efficiency in operation and service to the public and thereby impose an undue burden upon interstate commerce."

Thereafter, in the early part of 1966, the St. Louis Southwestern Railway Company filed a motion in the District Court of Smith County, Texas, to vacate, modify or suspend an injunction entered in 1906, enforcing the "Tyler Agreement" which had enjoined and restrained the "• • • St. Louis Southwestern Railway Company of Texas from removing its General Office from said City of Tyler • • •" *City of Tyler* v. *St. Louis Southwestern Ry. Co. of Texas,* 99 Texas 491, 91 S.W. 1 (Tex. Sup. 1906).

The railroad appealed the trial court's decision to the Court of Civil Appeals which held that the "• • • Interstate Commerce Commission has the power under the Transportation Act of 1920 and Amendments thereto to relieve railroads from the operation of private contracts if it deems such action to be in the public interest." *S. Louis Southwestern Ry. Co. of Texas* v. *City of Tyler,* 422 S.W. 2d. 780 (Tex. Civ. App., Eastland, 1967) writ ref. n.r.e. The City appealed the decision to the Texas Supreme Court by writ of error, but the Supreme Court denied with writ, and found no reversible error in the Appellate Court decision. See also *Texas* v. *United States, supra* and *Schwabacher* v. *United States, supra,* where the Supreme Court upheld the Commission's power to set aside contractual obligations imposed on the carriers by their respective charters.

With regard to the public interest, Section 5(2)(b) of the Act provides, that:

"If the Commission finds that • • • the proposed transaction • • • will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions • • • found to be just and reasonable."

In *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25, 77 L.Ed. 138 (1932); the Supreme Court said:

"The term 'public interest' • • • has a direct relation to the adequacy of our transportation system, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities."

The Commission has long been mindful of the policy behind Section 5 proceedings as reflected in this statement from *Seaboard Air Line R. Co.-Merger-Atlantic Coast Line*, 320 ICC 122, 206 (1963).

"(T)he purpose of Section 5 is to facilitate mergers • • • that are voluntarily entered into by the carriers themselves and have as their principal objectives the elimination of wasteful transport and the fuller utilization of the merging railroad potential for the rendition of efficient and economic service."

Applicants argue that it would be imprudent for them to effect the proposed merger if the entire system were to be subjected to the requirements of Texas law and other contractual obligations as set forth herein. The Administrative Law Judge agrees. For those requirements or restrictions would prevent Applicants from carrying on their business and locating offices and facilities in a manner most consistent with operating economy and efficiency. The continued maintenance of a separate corporate existence of a Texas company as required by Article 6260, V.A.T.S. with separate books, and a separate board of directors and officers, in compliance with Article 6281, 6282, and 6283, V.A.T.S. would defeat the purpose of the

application. If MoPac is not relieved from the operation of Article 6275, 6276, 6277 and 6278, V.A.T.S., requiring all railroads operating in the State of Texas to maintain general offices in Texas and specifically required named officers from the President of the company to the general claim agent to be located at said general office, MoPac, in legal contemplation, could be faced with the prospect of moving its entire base of operations and general offices from St. Louis, Missouri to Texas. The expenditures relating to such a movement, assuming that adequate facilities could be located in Texas, would be substantial. This movement would also require the relocation or replacement of hundreds of employees who are presently employed at the general offices of MoPac in St. Louis, Missouri.

To comply with Article 6281, V.A.T.S., requiring that the principal business of the railroad be conducted and claims for damages settled or adjusted in Texas would also appear to require large expenditures for the movement of the General Claims Department, excluding freight claims, from Missouri to Texas. Furthermore, compliance with Article 6277 and 6280 requiring the maintenance of machine shops, roundhouses, and requiring all repair work on equipment operating in Texas to be performed in Texas would be wastefully expensive, as well as prohibit MoPac from making repairs and maintaining its equipment at facilities presently located elsewhere, such as Little Rock, Arkansas and DeSoto and Sedalia, Missouri. In this regard, this record shows that approximately 70% of MoPac's total system-miles are located outside the State of Texas, but pursuant to the above statutes, MoPac could conceivably be required to maintain and repair all its equipment in the State of Texas. That is the reason why applicants feel that these requirements and the resulting expenditures are wholly unnecessary, burdensome, and inconsistent with the public interest. The Administrative Law Judge agrees.

Applicants also are seeking relief from the "Palestine Agreement" which is merely an extension of the Texas statutes originally enacted in 1889, and recodified as here-

inafter set forth herein and enforced by Judicial Decree in 1914. Among other obligations, as noted earlier, the Palestine Agreement requires that a specified percentage of the average number of office and shop employees of the MoPac be employed at Palestine, Texas. This obligation on its face requires MoPac to station several hundred employees at Palestine, Texas, despite the fact that they possibly could be used more efficiently at other locations as the need for transportation service would dictate. This agreement restricts managerial discretion as to where to locate various operations and employees in the most efficient and economic way as public services requirements fluctuate on MoPac's system. Such restrictions, so applicants argue, are clearly contrary to sound business policy and inconsistent with MoPac's duty to provide an economic and efficient transportation system to the public which is responsive to changed conditions and traffic flow. The Administrative Law Judge agrees.

For example, at the present time MoPac has the Freight Claims Section of the Accounting Department located in the City of Palestine, Texas, to partially satisfy its obligation under the agreement. This department was formerly located in St. Louis, Missouri, and transferred to Palestine, Texas in 1960. Today, there are 64 employees who make up the Freight Claims Section who are stationed at Palestine, Texas. This results in a situation where the Freight Claims Section is 664 miles away from MoPac's general offices, and located in a rather remote area of the State of Texas. The inefficiencies and added expenditures which occur by virtue of the Freight Claims Section being located in Palestine, Texas, are brought about mainly by the fact that all records relating to the shipments and movements of freight are located at the MoPac's general offices in St. Louis, Missouri, where there are adequate storage facilities. This means that whenever there is a freight claim, the records have to be located and shipped from St. Louis, Missouri, to Palestine, Texas, before the claim can be processed. This causes delays of several days in the processing of the public's claims and results in in-

efficient handling of these claims. If MoPac were relieved of the burdensome obligation to station several hundred employees in Palestine, Texas, the Accounting Department alone could eliminate 31,320 unneeded man hours, or, have the equivalent of a reduction of 15 employees in the Freight Claims Section. This could be brought about by moving the Freight Claims Section to St. Louis, Missouri, where all records are maintained and where the Freight Claims Section would have access to MoPac's computer operations and in addition, have the availability of MoPac's legal staff who could help expedite decisions on technical and legal matters related to the handling of claims. The savings that would be realized by movement of the Freight Claims Section to St. Louis, Missouri alone amount to approximately $240,238.00 per year plus result in the more efficient handling of the public's freight claims.

In addition to the Freight Claims Section being located at Palestine, Texas, there were, as of March 1, 1975, 209 employees from MoPac's Mechanical Department stationed at Palestine, Texas. These employees are also stationed at Palestine, Texas to satisfy MoPac's obligations under the agreement and thus constitute the major percentage of the total number of employees required to be stationed at Palestine, Texas. The Mechanical Department force of 209 men at Palestine, Texas, constitutes 18% of the total mechanical forces in Texas. However, despite the large number of the Mechanical Department employees stationed at Palestine, Texas, the shop facilities there are congested, poorly tooled and obsolete. These forces could be better and more efficiently utilized at other locations more suitable as service location for MoPac's system. However, under the terms of the agreement, MoPac is required to maintain a certain number of employees at Palestine, Texas, and is unable to relocate these employees without replacing them with other employees.

This record shows that MoPac is considering building a major shop facility at some other location in Texas more suited by geography and topography to meet MoPac's future needs, but, the Palestine Agreement prevents the

construction of such a facility because the agreement arbitrarily requires that a certain percentage of MoPac's employees be stationed at Palestine, Texas. New shop facilities could not practically be built in Palestine, Texas because of the physical constraints of the surrounding town. In addition, the general topography in the area surrounding Palestine, Texas, is not conducive for locating a major yard or major repair facility.

This record clearly establishes that through this merger proceeding applicants are seeking to establish an efficient unified rail system responsive to the public's need for adequate transportation service. Consistent therewith the Administrative Law Judge concludes that applicants should be relieved from the laws of Texas as set forth herein, the 1955 Agreement with the City of Palestine, the County of Anderson, and certain citizens named therein and, any obligations arising out of the 1914 Judicial Decree affirmed in *International & G.N. Ry. Co.* v. *Anderson County,* 174 S.W. 305 (Tex. Civ. App., Texarkana 1915) writ ref., pertaining to the establishment of machine shops and general offices in Palestine, Texas. For those requirements have no necessary relation to economy and efficiency in operation or service, are contrary to the public interest and the National Transportation policy, and would hinder Applicants' unified operation and service and thereby impose an undue burden upon the proposed unified operations and upon interstate commerce.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 4th day of May 1976.

Finance Docket No. 27773

MISSOURI PACIFIC RAILROAD COMPANY—MERGER—THE TEXAS AND PACIFIC RAILWAY COMPANY AND CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Finance Docket No. 27774

MISSOURI PACIFIC RAILROAD COMPANY—SECURITIES

Investigation of the matters and things involved in these proceedings having been made, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report together with the initial decision of the Administrative Law Judge is made a part hereof:

It is ordered, That the requests for oral argument be, and they are hereby, denied.

It is further ordered, That, in Finance Docket No. 27773, subject to the terms, conditions, and modifications referred to in the accompanying report, (1) the merger of the properties and franchises of The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company into the Missouri Pacific Railroad Company for ownership, management, and operation; (2) the acquisition by the Missouri Pacific Railroad Company of sole or joint control of companies subsidiary to and affiliated with The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company; and (3) the acquisition of indirect control by the Mississippi River Corporation, a noncarrier owner of a controlling stock interest in Missouri Pacific Railroad Company, be, and they are hereby, approved and authorized.

It is further ordered, That, in Finance Docket No. 27774, (1) the issuance by the Missouri Pacific Railroad Company of an amount not exceeding more than 972,772 shares of its common stock in exchange for the outstanding common stock of The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company and (2) the assumption by the Missouri Pacific Railroad Company of all obligations and liabilities of The Texas and Pacific Railway Company and the Chicago & Eastern Illinois Railroad Company in respect of securities issued by those carriers pursuant to authorizations under section 20a of the Interstate Commerce Act, be, and they are hereby, approved and authorized.

It is further ordered, That the petition for inclusion in the transaction approved herein filed by the Chicago, Rock Island and Pacific Railroad Company and the request for reopening contained therein be, and they are hereby, denied.

It is further ordered, That if the authority herein is exercised, the Missouri Pacific Railroad Company shall submit for the consideration and approval of the Commission, three copies of the journal entries required to record the transactions authorized herein.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of or assumed by the Missouri Pacific Railroad Company unless or until so ordered or approved by this Commission.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States.

It is further ordered, That the Missouri Pacific Railroad Company shall report concerning the matters involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6).

It is further ordered, That jurisdiction is expressly reserved by this Commission to receive such petitions, institute such investigations, and issue such orders to accomplish the objectives and purposes of the conditions prescribed herein, and this reservation of jurisdiction is in addition to those orders which may be issued under the provisions of section 5(10) of the Interstate Commerce Act which are deemed necessary or appropriate to supplement this order.

It is further ordered, That this order shall be effective from and after 35 days from date of service.

And it is further ordered, That if the authority granted herein is not exercised within 1 year from the effective date hereof, or such further time as may be fixed by the Commission, it shall be of no further force and effect.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)